TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL., APPELLANTS,

vs.

TOWN OF HEMPSTEAD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED APRIL 7, 1961

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[fol. 1]

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants-Appellants.

STATEMENT UNDER RULE 234

The action was commenced in the Nassau County Supreme Court by service of a Summons and Complaint on April 28, 1959. Issue was joined by service of an Answer on May 18, 1959.

Defendants-Appellants appeal from the Judgment entered in this action in the office of the County Clerk of Nassau County on August 4, 1959, which adjudged that Ordinance No. 16 of the Town of Hempstead and enforcement thereof are valid exercises of the Town's police power, which enjoined the defendants from conducting sand mining, dredging and/or pit excavations until a permit is issued therefor and certain alleged violations are corrected, which adjudged that the counter-claim be dismissed and which adjudged that the County Clerk record a certified copy of said Judgment in the Miscellaneous Index in his office.

There have been no changes of attorneys since the commencement of this action. Plaintiff appeared by John A. Morhous, Esq., by Richard P. Charles, Esq., Special Coun-
[fol. 2] sel, Town Attorney, Town Hall, Front Street, Hempstead, N. Y. Defendants appeared by Edward M. Miller, Esq., 127 Twig Lane, Levittown, N. Y. There have been no changes in parties since the commencement of this action.

[fol. 3]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

TOWN OF HEMPSTEAD, Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants.

NOTICE OF APPEAL TO THE APPELLATE DIVISION—
August 4, 1959

Sir:

Please take notice, that the defendants hereby Appeal to the Appellate Division, Second Department, of the Supreme Court of the State of New York, from the Judgment entered in this action in the office of the Clerk of the County of Nassau on the 4th day of August, 1959, which said Judgment adjudged that the Ordinance No. 16 of the plaintiff and enforcement thereof are valid exercises of the Town's police power, that the defendants be enjoined from conducting sand mining, dredging or pit excavations, that the defendants' counterclaim be dismissed on the merits, and that this Appeal is taken from each and every part of said Judgment as well as from the whole thereof.

[fol. 4] Yours, etc.,

Edward M. Miller, Attorney for Defendants, Office and P. O. Add.: 127 Twig Lane, Levittown, New York.

To: John A. Morhous, Esq., Town Attorney and Attorney for Plaintiff, Office and P. O. Address, Town Hall, Front Street, Hempstead, N. Y.

Clerk, County of Nassau.

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

SUMMONS

Plaintiff designates Nassau County as the place of trial.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, April 23, 1959.

John A. Morhous

[fol. 6]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

COMPLAINT

Plaintiff, by its attorney, John A. Morhous, complaining of the defendants alleges:

As and for a First Cause of Action

First: At all times hereinafter mentioned, plaintiff was and still is a municipal corporation of the State of New York, having its offices at Town Hall, Front Street, Hempstead, in the County of Nassau, State of New York.

Second: On information and belief, and according to public records, defendant Herbert W. Goldblatt, at all times hereinafter mentioned, was and still is the owner of the premises hereinafter described in the paragraph of this complaint marked Fourth.

Third: On information and belief, at all times hereinafter mentioned, defendant Builders Sand & Gravel Corp. was and still is a domestic corporation organized and existing under the laws of the State of New York.

Fourth: Defendant, Builders Sand & Gravel Corp., is conducting sand mining, dredging and/or pit excavation operations on premises owned by defendant, Herbert W. [fol. 7] Goldblatt, the same premises being located on the east side of Newbridge Avenue at East Meadow, an unincorporated area in the Town of Hempstead, County of Nassau, State of New York, shown on the Land & Tax Map of the County of Nassau as Section 50, Block L, Lot 9, comprising approximately 39 acres.

Fifth: The said property has been utilized for sand mining, dredging and/or excavation by Builders Sand & Gravel Corp. and/or other persons since prior to December of 1945.

Sixth: Pursuant to Sections 130 and 136 of the Town Law of the State of New York, the Town of Hempstead duly adopted, on or about December 18, 1945, an Ordinance regulating sand mining, dredging and/or excavation known as "Ordinance No. 16 of the Town of Hempstead". A copy of said Ordinance, as amended, is annexed hereto and made a part hereof.

Seventh: The defendants have failed to procure or to apply for a permit, in violation of the provisions of "Ordinance No. 16 of the Town of Hempstead".

Eighth: The failure and refusal of the defendants to comply with the requirements of "Ordinance No. 16 of the Town of Hempstead" by applying for and obtaining a permit is a continuing violation of said Ordinance by the defendants.

Ninth: The plaintiff has no adequate remedy at law and has not heretofore applied for the relief herein sought.

[fol. 8] As and for a Second Cause of Action

Tenth: The plaintiff reiterates and realleges each and every allegation contained in paragraphs numbered First through Sixth of this complaint.

Eleventh: On information and belief, at the present time and for a period of time prior hereto, the defendants have used or permitted to be used the described property in violation of the express provisions of "Ordinance No. 16 of the Town of Hempstead", as amended, in that: At various locations the pit excavation commences within 20 feet from the adjoining property line; and in that, in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot and said sidewalls are not supported by retaining walls; and in that, there is no concrete curb beneath the fence which encloses the described property, and said fence contains openings, other than necessary gates for ingress and egress, which permit public access to the pits and slopes; and in that, the pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site; and in that, defendants have failed to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the Ordinance.

Twelfth: The violations described in paragraph Tenth are continuing violations of "Ordinance No. 16 of the Town of Hempstead" by the defendants.

[fol. 9] Thirteenth: The plaintiff has no adequate remedy at law and has not heretofore applied for the relief herein sought.

Wherefore, plaintiff demands

1. Judgment enjoining and restraining defendants from conducting said sand mining, dredging and/or pit excavation operations perpetually, or until such time as they shall correct the present violations and obtain from the Town of Hempstead the permit required under "Ordinance No. 16

of the Town of Hempstead", and for such other and further relief as to the Court may seem just and equitable in the premises.

2. That an order be made, pending the determination of this action, enjoining and restraining the defendants from conducting sand mining, dredging and/or pit excavation operations on the premises located on the East side of Newbridge Avenue at East Meadow, Town of Hempstead, County of Nassau, State of New York.

John A. Morhous

[fol. 10]

ORDINANCE ANNEXED TO COMPLAINT

(See Opposite ☞)

TOWN OF HEMPSTEAD, NEW YORK

ORDINANCE No. 16

Pursuant to the provisions of Section 130 of the Town Law of the State of New York, as amended, the Town Board of the Town of Hempstead, Nassau County, New York, does hereby ordain and enact the following ordinance relating to

BANK AND PIT, TOPSOIL REMOVAL AND OTHER EXCAVATIONS

I, NATHAN L. H. BENNETT, Town Clerk of the Town of Hempstead, do hereby certify that the following is a true transcript of the above mentioned ordinance and of the whole of such original as adopted by the Town Board of the Town of Hempstead on December 18, 1945, and last amended Nov. 25, 1958.

ARTICLE I

Section 1. Declaration of Policy. It is hereby declared to be the policy of the Town Board to provide for the proper use of land to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion which depletes the land of its natural vegetative cover and supply of organic material, renders such land unproductive and unsuitable for agricultural purposes and undesirable for building homes, resulting in lower land values. By this ordinance the Town Board seeks to remove the danger to health and life caused by deep excavations remaining in the ground; and the stripping of topsoil, thereby resulting in damage to agricultural crops through dust storms in dry weather, by exposure of the bare earth to wind action and in wet periods by pools of water, which ordinance will promote the safety, health and general welfare of the people of the Town.

Section 2. As used in this ordinance the following terms shall have the meanings hereinafter designated:

(a). Earth — shall include sand, clay, gravel, mud, log and rock, but not topsoil.

(b). Excavation. — shall mean the removal of more than 75 cubic feet of earth from the ground in a vertical dimension of more than three feet for any purpose other than the improvements of land for permitted uses not otherwise regulated by this ordinance, other than sewage disposal systems, other than the purposes described by Sec. 9 hereof, and other than the removal of material subject to the Dredging Ordinance of the Town of Hempstead.

(c). Pit Excavation — shall mean any excavation involving the removal of more than one thousand cubic feet of earth leaving a hole or depression below the grade of the surrounding land;

(d). Bank Excavation — shall mean any excavation involving the removal of more than one thousand cubic feet of earth, other than a pit excavation.

Section 3. Application for Permit. Before any excavation is commenced for any purpose and topsoil, earth, sand, gravel, rock or other substance is removed from the ground, the owner, lessee or agent of the premises shall obtain a written permit therefore from the Town Board. For that purpose, such applicant shall file with the Building Inspector of the Town of Hempstead a verified application in duplicate for such permit, containing a detailed statement of the proposed work, together with a plan prepared by a duly licensed engineer or land surveyor of the State of New York, setting forth in detail the following information:

(a). All information as required on the application form prepared by the Building Department, including a detailed statement of the proposed work and three dimensional extent of the proposed excavation and exact condition of the plot or premises before the work is commenced and proposed condition of the said plot or premises after the work is completed;

(b). The plan shall be drawn to scale and give all streets adjoining the property, the location and dimensions of the premises upon which it is proposed to excavate, location, size and use of any existing buildings, cross sections of the property, giving elevations thereof at intervals of fifty (50) feet squares and also at each break in the grades, and the elevation of the premises as compared to the elevation of any abutting highways;

(c). A duly acknowledged consent in writing of the owner of the premises and mortgagee, if any, including his or their address;

(d). Receipted tax bills or a certificate from the Receiver of Taxes of the Town of Hempstead and the County Treasurer of Nassau County showing payment of all taxes or assessments to date against the property described in the application.

(e). A certificate of the Commissioner of Public Works of the County of Nassau that such proposed excavation and the finished grades of said property as shown on said map will not interfere with the Comprehensive Drainage Plan of the County of Nassau and will not endanger any road, street or highway of the County of Nassau or of the Town of Hempstead or other property of the said County or Town.

(f). A certificate from the Commissioner of Agriculture and Markets of the State of New York, or his duly appointed agent or representative, stating any topsoil to be taken in the area described in the application is apparently free of Golden Nematode of Potato.

(g). The purpose of the proposed excavation;

(h). The existing and the theoretical maximum ground water level at the location.

Section 4. (a) No Pit Excavation shall be made within twenty (20) feet of any property line.

(b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls equal to that specified in the Building Code of the Town of Hempstead for permanent building foundations.

(c). Any removal of more than 75 cubic feet of earth from the ground in a vertical dimension of more than three feet shall be protected by suitable barriers and lights. All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(d). Dust-down or a similar dust layer shall be spread on access roads and other traveled areas used in connection with every pit or bank excavation to protect the public and the surrounding area against wind-blown mold and dust.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity or to substantially obstruct, impede or change the course of or the natural movement or flow of the water in or otherwise adversely affect any public waterway or public body of water or

[fol. 12]

Ordinance Annexed to Complaint

(See Opposite ☞)

any watercourse, body of water which is used as a part of any public drainage system.

(f). No removal of earth from the ground shall be made so as to expose to possible pollution, by salt water intrusion or otherwise, any underground water used as a public water supply.

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, or so to render unreasonably difficult or unreasonably delay travel from one place to another or so to render unduly difficult or substantially increase the cost of the installation of public utilities or other public services, or so to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i). The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, and, may revoke or suspend any permit issued hereunder if it shall find that the removal of earth thereunder violates any such provision.

(j). When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, non-burnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

TOPSOIL STRIPPING AND REMOVAL

Section 5. No Stripping or Removal. No stripping or removal of topsoil shall be made within ten (10) feet of any property line and upon completion of the work the premises, if below grade, shall be graded to the level of the abutting highway or the original grade if the same were below the level of the highway. Dust-down, or its equal, shall be spread to prevent dust from flying and there shall be left upon the surface of the land from which topsoil is removed not less than six (6) inches of topsoil. No topsoil shall be removed between the first day of October and the first day of April in the following year. All areas from which topsoil is removed shall during the period between August 30th and October 1st, inclusive, be prepared into a loose level seed bed, fined, fertilized and seeded in the following steps:

(a) Apply Ground Limestone at the rate of one ton per acre.

(b) Apply 5-10-5 fertilizer at the rate of 600 pounds per acre.

(c) Disc area to work limestone and fertilizer into the soil to a depth of at least three inches.

(d) Smooth area with a smoothing harrow.

(e) Sow the following seed mixture at the rate of 100 pounds per acre:

Timothy	30 pounds
Kentucky Bluegrass	30 pounds
Redtop	10 pounds
Perennial Rye Grass	20 pounds
Alsike Clover	4 pounds
Wild White Clover	1 pound
	100

(f) Brush in seed lightly.

(g) Roll firm with ground roller.

PROVISIONS APPLICABLE TO BOTH BANK AND PIT EXCAVATIONS AND TOPSOIL REMOVAL

Section 6. Bond or Cash Deposit. Before the issuance of a permit, the applicant and the owner of record of the premises shall execute and file with the Town Clerk, a bond, approved by the Town Board of the Town of Hempstead in an amount to be fixed by said Board, but not less than $2,000 with a surety company as surety and conditioned for the faithful performance of the conditions contained in this Article, the observance of all municipal ordinances, and to indemnify the Town of Hempstead and/or the Superintendent of Highways for any damage to Town property. In the event of a default such bond shall be forfeited to the Town of Hempstead.

Said bond shall remain in full force and effect until a certificate of completion has been issued by the Building Inspector, certifying to the fact that all provisions of this ordinance and conditions of the permit have been fully complied with. Application for such certificate shall be made by the applicant, owner, lessee or his agent on forms provided by the Town of Hempstead and shall be accompanied by a map drawn to scale showing a cross-section of the affected property, giving elevations thereof as provided in subdivision (b) of Section 3 of this ordinance, prepared by a duly licensed engineer or land surveyor of the State of New York after the completion of the operations, who shall also certify that there is not less than six (6) inches of topsoil remaining upon the ground from which topsoil has been removed and that such area has been seeded in compliance with Section 5 hereof.

In lieu of such bond a cash deposit or deposit of negotiable securities may be made with the Presiding Supervisor of the Town.

Section 7. Fees. The officer designated by the Town Board to issue such permits shall charge and collect for each such permit:

(a) Bank and Pit Excavations. A minimum fee of $200 for an excavation volume not to exceed 20,000 cu. yds. For excavations exceeding 20,000 cu. yds. the minimum fee shall be $200, plus one cent for each additional cu. yd. or fraction thereof.

(b) Topsoil Removal. A minimum fee of $25 for an area not exceeding 5,000 sq. ft. For areas exceeding 5,000 sq. ft. the minimum fee shall be $25, plus $10.00 for each additional 5,000 sq. ft. or fraction thereof.

Section 8. Limitation of Permits.

(a) Bank and Pit Excavations. Such permits shall expire by limitation one year from the date of issuance, unless extended by the Town Board.

(b) Top Soil Removal. Such permits shall expire by limitation sixty (60) days from the date of issuance unless extended by the Town Board, and no permit or permits shall be granted:

(1) For removal of more than four (4) acres of topsoil from any one tract of land until full compliance with the ordinance is had under any existing permit for the same tract except the preparation of the ground and seeding as provided in Section 5 hereof, and

(2) No permit shall be valid except between April 1st and October 1st of any year.

Section 9. Exceptions. Nothing contained in this ordinance shall require a person to obtain a permit hereunder for or prevent a person from removing topsoil from one part of his lands to another part of the same premises when such removal is necessary or an accessory use or is made for the purpose of leveling or improving said property or for the installation of public improvements or public utilities, or to obtain a permit hereunder either for the installation of public utilities under a road opening permit or for the removal of material regulated by the Dredging Ordinance of the Town of Hempstead, No. 62.

Section 10. Penalties. For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of the premises where such violation has been committed or shall exist and the owner, general agent, contractor, lessee or tenant of any part of the premises in which such violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits, takes part or assists in any such violation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $250.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

Section 11. Separability. If any clause, sentence, paragraph, section or part of this Code shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 12. This Ordinance shall be known and may be cited as "Top Soil Removal Ordinance of the Town of Hempstead" or as Ordinance No. 16 of the Town of Hempstead.

Article 17 of the Building Code of the Town of Hempstead, adopted on May 20th, 1941 and amended on March 9th, 1943 is hereby repealed.

This ordinance shall take effect immediately.

[fol. 14]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

ANSWER

Defendants, answering the complaint herein by their attorney, Edward M. Miller, respectfully allege:

First: As to the first cause of action, deny each and every allegation contained in paragraphs designated "Sixth" through "Ninth" of the complaint herein.

Second: As to the second cause of action, repeat and reallege the aforesaid denials to the extent that the same matter is repleaded by reference, and deny each and every allegation contained in paragraphs designated "Eleventh", "Twelfth" and "Thirteenth" of the complaint herein.

As and for a First, Separate and Complete Defense:

Third: That heretofore and on or about April 5th, 1956 a Judgment was entered in the Office of the Clerk of the County of Nassau, adjudging that the defendants herein have a valid, nonconforming use in the conduct of a sand and gravel business notwithstanding any ordinances of the plaintiff as to the real property set forth in the complaint herein, and defendants beg leave to refer to the original [fol. 15] thereof upon the trial for the exact provisions thereof.

Fourth: That by reason of the aforesaid Judgment, the alleged issue of the complaint herein is res adjudicata and that the said Judgment is a bar to the maintenance and prosecution of this action.

As and for a Second, Separate and Complete Defense and Counterclaim:

Fifth: Repeat, reiterate and reallege each and every allegation contained in paragraphs Third and Fourth herein, with the same force and effect as if herein set forth at greater length.

Sixth: That the Ordinance alleged in the complaint herein is unconstitutional, illegal, invalid, discriminatory, confiscatory and void, inasmuch as same is deemed to affect the premises of the defendant, Goldblatt, in that this Court has previously adjudicated the non-conforming use of the premises for the business conducted by the defendants herein; that the said Ordinance further is void on the ground that it constitutes *ex post facto* legislation and contravenes the provisions of the U. S. Constitution and the Constitution of the State of New York; that said Ordinance further is void on the ground that its application would deprive the defendant, Goldblatt, of the lawful use of his property without due process of law and further that application thereof to the said premises so permanently restricts the beneficial use thereof as to amount to a confiscation of property rights without just compensation.

[fol. 16] Seventh: That by reason of the aforesaid, defendants are entitled to a Judgment decreeing the said Ordinance as unconstitutional and void as applied to the real property described in the complaint, for which defendants have no adequate remedy at law.

As ard for a Third, Separate Defense:

Eighth: That the plaintiff, over a period of many years, has indicated a need for and the desire to acquire the real property set forth in the complaint, in order to correct drainage conditions in the adjacent area.

Ninth: That the plaintiff, for some period of time, has installed drainage pipes in streets adjacent to the premises involved herein; that in the specifications for public bidding on such improvements the plaintiff's engineering department has indicated a flow of water toward the property of the defendant and the installation of pipe to the property line of the defendant.

Tenth: That the plaintiff, over a period of many years, has been engaged in a series of trials with the defendants concerning this property, not for the enforcement of public rights but calculated solely to harass and annoy these de-

fendants in an attempt to acquire the realty alleged in the complaint at a price lower than true value.

Eleventh: That as a result of the aforesaid, the plaintiff appears in Equity with unclean hands and is not entitled to relief from this Court.

[fol. 17] Wherefore, defendants demand Judgment:

(1) Dismissing the complaint herein;

(2) Declaring the Ordinance pleaded in the complaint as being unconstitutional, void and ineffective as applied to the defendants and to the real property described in the complaint;

(3) For such other and further relief as to the Court may seem just and proper;

together with the costs and disbursements of this action.

Edward M. Miller

[fol. 18]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Special Term, Part II, Mineola, N. Y.

Present: Hon. Mario Pittoni, Justice.

JUDGMENT APPEALED FROM—Entered August 4, 1959

An action having been commenced by the service of a copy of the summons and complaint on each of the above named defendants, and the defendants having interposed an answer asserting a counter claim, and it having been stipulated upon the trial of the action in open court and on the record that plaintiff be deemed to have replied to and to have denied the defendants' alleged counter claim, and the action having regularly come on for trial at Special Term, Part II of the Supreme Court, Nassau County, held in the Court House at 33 Willis Avenue, Mineola, New York, on the 16th, 17th and 18th days of June, 1959, and the plaintiff having appeared on said trial by John A. Morhous,

Esq., Town Attorney, Town of Hempstead, and Richard P. Charles, Esq., as Counsel, and the defendants having appeared upon the said trial by Edward M. Miller, Esq., their attorney, and the plaintiff and defendants having adduced their proofs, and at the close of the entire case, and after due deliberation the Court having made and filed a signed and written opinion and decision dated July 13, 1959 grant-
[fol. 19] ing judgment on the merits in favor of the plaintiff, Town of Hempstead, and against the defendants, Herbert W. Goldblatt and Builders Sand & Gravel Corp., for the relief demanded in the complaint to the extent hereinafter set forth, and further dismissing the defendants' said alleged counter claim,

Now, on motion of John A. Morhous, Esq., Town Attorney, Town of Hempstead, attorney for the plaintiff, it is hereby

Ordered, adjudged and decreed that Ordinance No. 16 of the Town of Hempstead and the enforcement thereof are valid exercises of the Town's police power, and it is further

Ordered, adjudged and decreed that the defendants, Herbert W. Goldblatt and Builders Sand and Gravel Corp., their servants, agents, employees, representatives, heirs, assigns and successors in interest are enjoined from conducting sand mining, dredging and/or pit excavations on the real property known as Section 50, Block L, Lot 9 on the Land Map of the County of Nassau, until such time as (1) a permit for such operations has been issued by the Town of Hempstead pursuant to said Ordinance No. 16, and (2) the defendants shall have corrected the following violations of the said Ordinance No. 16:

(a) the excavation commences within 20 feet from the adjoining property line;

(b) The excavation is more than 10 feet below the established grade of the nearest public street and the incline of the side walls is more than 2 horizontal feet to 1 vertical foot and the said side walls are not supported by retaining walls;

[fol. 20] (c) There is no concrete curb beneath the fence which encloses the property and said fence contains openings other than necessary gates for ingress and egress, which permit public access to the pits and slopes;

(d) The pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site;

(e) The defendants have failed to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the Ordinance;

and it is further

Ordered, adjudged and decreed that the counter claim of the defendants herein be, and the same hereby is, dismissed on the merits; and it is further

Ordered, adjudged and decreed that the Clerk of the County of Nassau be and he hereby is directed to record a certified copy of this Judgment in the Miscellaneous Index or other appropriate index of the records in his office against the premises above described.

Enter:

Mario Pittoni, J. S. C.

Francis J. Anderson, Deputy & Acting County Clerk of Nassau County.

[fol. 21]

IN THE SUPREME COURT OF NEW YORK

COUNTY OF NASSAU

Special Term—Part II

Case and Exceptions—Transcript of Hearing—June 16, 1959

Mineola, New York

Before: Hon. Mario Pittoni, Justice.

APPEARANCES:

John A. Morhous, Esq., Town Attorney, By Richard P. Charles, Esq., Special Counsel, William C. Mattison, Esq., Mario Matthew Cuomo, Esq.

Edward M. Miller, Esq., Attorney for the Defendants.

The Court: Before we get started, will you tell me briefly what this case is about?

Mr. Charles: Yes, sir.

PLAINTIFF'S OPENING STATEMENT

The Court: Just to give me an idea of what the case is about so that I may follow it more closely.

Mr. Charles: Yes, sir. The plaintiff, as your Honor knows, is the Town of Hempstead. The defendant Herbert Goldblatt is the owner of a certain parcel of land known on the tax map of the County of Nassau as Section 50, Block L, Lot 9. It is about a 39-acre plot of land and it lies over in East Meadow, North Bellmore.

[fol. 22] It is the plaintiff's contention that, in violation of Ordinance No. 16 of the Town Ordinances of the Town of Hempstead, the defendants are mining sand and carrying on a mining operation of sand and gravel on this 39-acre plot; that they are doing it without having applied, as we allege in the first cause of action, for a permit in accordance with the terms of the ordinance; and that no permit has ever been issued to it for the mining of sand on this plot. That is our first cause of action.

Our second cause of action alleges that in violation of the ordinance, and on the regulatory part of the ordinance, the operation being conducted by the defendants violates the ordinance in the following manner: that the pit commences within 20 feet of an adjoining property line; that it is 10 feet below the established grade of the nearest public street; and that the side walls of the pit, namely the slope of the pit, are more than 2 horizontal feet to a 1 vertical foot drop in depth; furthermore, that there is no concrete curb around the fence of the pit. There is a provision in the ordinance that the pit be fenced, but there is also another provision that at the bottom of the fence there be a concrete curb beneath the fence.

We further allege that the bottom of the pit now has been excavated substantially beyond 2 feet above the maximum ground water levels at the site. That is a method of determining where the natural waters run out of the ground and form a pond or a pit. Under that point we will prove that of the 39 acres that are involved in this parcel, approximately 20 acres are land under water with an average depth [fol. 23] of approximately 25 feet, and in some places a depth of 48 feet. This is water all below the maximum ground water level.

We say that under those circumstances we have no adequate remedy at law, and pursuant to Section 135 of the Town Law, in prosecutions under ordinances of this type, we have the right to ask this court for an injunction restraining the defendants from mining operations, (1) until they file an application and obtain a permit, and (2) until they comply with the regulatory statute sections of the ordinance. That is the plaintiff's case.

The Court: Mr. Miller.

Defendants' Opening Statement

Mr. Miller: If it please the Court, the defense in this action will be based on both legal defenses and equitable defenses; of course, this is a trial in equity. The legal defenses to the complaint of the plaintiff basically arise from a determination which we secured back in a trial before Mr. Justice Hill in this court, which action was commenced in

1953. We have been in constant litigation with the township since 1953.

The first case was an action to perpetually enjoin our mining operations on the ground that we violated the zoning ordinance and were conducting business in a Residence "B" zone. Mr. Justice Hill, after taking testimony as to the extent and nature of our operation, the size of the lake, the depth of the lake, the extent of our equipment—and I have the minutes of that trial and will introduce it in evidence—entered a decision in the defendants' favor dismissing the complaint and granting our counterclaim, in which he held that we had a valid nonconforming use under the decisions [fol. 24] of the Court of Appeals, namely People v. Miller and Town of Somers v. Camarco, and that our mining operation could be carried on in futuro as to the entire 38-acre parcel.

Our first legal defense, therefore, if your Honor please, is that with respect to the operation of this mining business the alleged issues in the complaint herein are res judicata, and that this is an attempt to again litigate what has already been litigated before Mr. Justice Hill and from which no appeal was taken. I therefore will submit to the Court as a matter of law that this is the law of this case, because there is an identity of parties, an identity of subject matter, and that the Town should be forever barred and foreclosed from again raising the same questions. Their remedy was to take an appeal which they did not do; therefore, it is determinative as to those points here.

We will show your Honor also that since 1953 and for some time prior thereto a severe drainage condition has existed in the neighborhood; that the Town has made repeated efforts, and the County has made repeated efforts, to obtain easements, to negotiate for the purchase and to discuss condemnation. We will show you maps officially drawn for condemnation of our property. We will adduce also testimony as to the various conferences with the Town and County officials upon which we expect to convince the Court that the motive behind this suit is to try and knock down the price in a condemnation proceeding which we feel is imminent, and we believe your Honor will agree with us.

The plaintiff therefore, we say, does not appear in equity today in good faith and with clean hands, and therefore [fol. 25] should be barred from the relief that it seeks.

Further, we will ask the Court, after the production of proper evidence, not only to dismiss the complaint, but also to grant us an affirmative judgment in our favor, in that any of the alleged violations of this Ordinance No. 16 are not violations but that we have a valid existing and subsisting nonconforming use with respect to those provisions.

Mr. Charles outlined two or three points which he says the plaintiff expects to prove, such as that we are too close to the fence. We will prove to your Honor's satisfaction that we were in such a position long before they had any such ordinance, and therefore we have the basic law of nonconforming use again coming into play in this case, the same as on the zoning question before Mr. Justice Hill.

In 1927—and these are in the minutes of the first trial—we had a lake 30 feet in depth, so that quite obviously we were 10 feet below grade in 1927 and we were to a greater extent below the 2 feet above maximum ground level in 1927, and this township never had any ordinance of any kind until the zoning ordinance of 1930. As a matter of law we respectfully submit that we will prove that we have a valid nonconforming use as against the alleged violations of the second cause of action in the complaint.

With respect to the cause of action in the complaint on a permit, our defense is that this is a penal ordinance. The punishment for the violation of this ordinance is a misdemeanor. To make this ordinance therefore operate retrospectively is ex post facto legislation and therefore uncon- [fol. 26] stitutional. This is not a civil ordinance, this is a criminal ordinance, and the ordinance in its own terms reads, "Application for permit before any excavation is"—

The Court: How can it be ex post facto if they claimed present violation?

Mr. Miller: For the simple reason, Judge, it says, "Before any excavation is commenced." In other words, if I wanted to start a brand-new sand pit today on virgin vacant land, I would be governed by the terms of this ordinance. But for them to bring it in this case and say, "This applies back to you even though you started in 1927," back before

we ever had an ordinance, that is applying it retrospectively, not prospectively, and therefore it would be ex post facto to go back to 1927 and say, "What you did in 1927, although then legal, we now declare illegal."

The Court: But, counsel, before we get involved in that ex post facto situation, the ex post facto laws only apply to criminal prosecutions.

Mr. Miller: If your Honor please, they are bringing injunctive relief under a criminal statute, because this section has penalties. Section 10 provides that violation of this—a person shall be guilty of a misdemeanor punishable by a fine of not more than $500 or imprisonment for a period not exceeding six months, and each week's continued violation is a separate violation. This is a penal statute, this is not a civil statute, this is not a regulatory provision; this is a criminal statute punishable by jail and fine.

The Court: But they are not asking jail and fine.

[fol. 27] Mr. Miller: They are not asking it in this proceeding, but that I say is the actual punishment under the very terms of the ordinance under which they base their complaint, and on those defenses which we expect to prove to the Court's satisfaction, we submit that there should be a dismissal herein and an affirmative judgment on our counterclaims in favor of the defendants.

The Court: All right. I have your respective positions now, and I also gave you some thoughts that I had on the question of ex post facto.

Mr. Miller: Yes. If your Honor please, as I stated to your Honor on the call of the calendar yesterday morning, in preparing for this trial in two weeks with the extensive examinations, I have been unable to complete my memorandum of law and would have to ask the Court's indulgence for a time after the completion of the trial, and I will be glad to brief the question of ex post facto also when I get to that.

The Court: You can brief it. I hope it has not changed since I last looked at it.

Mr. Charles: Mr. Ahrens.

GEORGE C. AHRENS, residing at 22 Daffodil Lane, Wantagh, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

COLLOQUY

Mr. Charles: Before I examine the witness, your Honor, there is just one thing that bothered me on a question of pleadings. The second separate defense is labeled a second separate and complete defense and counterclaim. As a matter of fact, it is not a counterclaim, and I did not reply [fol. 28] to it, deeming the second separate defense deemed denied. If for the purpose of the record we want the counterclaim denied, I ask the Court to permit me to show on the record that the counterclaim is considered denied.

Mr. Miller: I have no objection, if your Honor please, to the counterclaim being deemed denied. It was denominated a counterclaim because we asked for affirmative relief in a way of a declaratory judgment from the court after the production of all evidence.

The Court: Then the counterclaim is deemed denied upon your motion and upon the consent of Mr. Miller.

Mr. Charles: Thank you.

Mr. Miller: Mr. Charles before we proceed, if your Honor please, I would like at this time to offer a notice to admit dated June 1, 1959.

(Discussion between counsel off the record.)

Mr. Miller: We have made eleven separate examinations before trial in this case, Judge. I have only received back ten of them signed, but I understand one of them will be back either late today or tomorrow, and I would like to offer them at the beginning of the trial, the separate examinations.

Mr. Charles: Just a moment on that. You examined these witnesses on behalf of your defenses, and we stipulated at the beginning of the examinations that the relevancy of [fol. 29] the examinations was to be reserved until the trial, and I think as a matter of procedure we should wait until I have proven my case, and then you can specifically tell me which one of these you are offering on which defense

so I will know where we are going, instead of just taking eleven examinations totaling 200 pages and dropping them on the Court's lap and our lap without any question of their relevancy, materiality or competency.

The Court: Suppose you let Mr. Charles try his plaintiff's case first, and then after he finishes proving the case as he wishes, you will have your opportunity, of course, to defend this case as you wish within the rules of evidence, of course.

Mr. Miller: I will withdraw that, Judge, because all of the persons who have been examined are under subpoena and they will be here as witnesses.

The Court: We will talk about that when we get to your defense, Mr. Miller.

Direct examination.

By Mr. Charles:

Q. Mr. Ahrens, where are you employed?

A. I am employed in the Town Hall of the Town of Hempstead.

Q. In what capacity?

A. I am a deputy town clerk.

Q. As a deputy town clerk of the Town of Hempstead, are the records of the Town under your care and supervision?

A. They are.

Q. Did you make an examination of those records for the purposes of seeing whether or not any application had [fol. 30] even (sic) been filed against the property known as Section 50, Block L, Lot 9, on the Land and Tax Map of the County of Nassau for permission to mine sand and gravel?

A. I did.

Q. Did you find any such application?

A. I did not.

Q. Did you then search the records for the purposes of ascertaining whether or not any permit at any time had even (sic) been issued to this land known as Section 50, Block L, Lot 9, for granting permission to mine sand and gravel on the premises?

A. I did make such a search, yes.
Q. Did you find anything?
A. No, I did not.

Mr. Charles: Your witness.

By Mr. Miller:

Q. Mr. Ahrens, do you have any knowledge of an action—

Mr. Charles: Just one other point, before you go ahead.

By Mr. Charles:

Q. At my request did you produce a copy of Ordinance No. 16?
A. Yes, I have.
Q. May I see it?
A. Yes. (Produced.)
Q. That is your signature certifying to the correctness of it?
A. Yes, it is.

Offer in Evidence

Mr. Charles: I offer it in evidence.
The Court: What is that, Mr. Charles?
Mr. Charles: That is the ordinance, Ordinance No. 16.
[fol. 31] Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Cross examination.

By Mr. Miller:

Q. Mr. Ahrens, do you have any knowledge of previous litigation between the Town of Hempstead and the owners of this sand pit?
A. No direct knowledge, no.
Q. When you say "direct," that implies indirect. Do you have any knowledge of any nature with respect to any previous litigation between the Town and the owners of this pit?
A. I heard you discussing it with Mr. Charles before.

Q. I show you from the County Clerk's file in Proceeding No. 7006 of 1954 a judgment signed by Hon. L. Barron Hill and ask you if you would look at this, please, and then I ask you if you have any personal knowledge of that lawsuit.

A. I do not recall it, no.

Q. I ask you, sir, in the same County Clerk's file if you will read a decision by Mr. Justice Hill dated March 9, 1956, and ask you if you have any knowledge of that decision.

The Court: Keep in mind, Mr. Miller, this man has merely testified about a search for two documents, that is all he has testified to. He has merely produced a copy of an ordinance, and that is all he has testified to, that is all he was called here to testify to.

Mr. Miller: I realize that, sir.

The Court: Before we go any further, there is an old saying in baseball, "Keep your eye on the ball." Do not [fol. 32] confuse me with side issues.

Mr. Miller: I am not trying to confuse you, sir.

The Court: What are you going to develop through this witness?

Mr. Miller: It is cross-examination, Judge, on the question of credibility.

The Court: I know it is cross-examination.

Mr. Miller: On the question of credibility. I want to know if he has any knowledge of this proceeding.

The Court: What credibility?

Mr. Miller: He testified there was no permit to mine sand and gravel. There is an implication in his testimony that it is an illegal operation. I want to show that it is legal by an order of this court, by a judgment of this court.

The Court: Go ahead.

A. I have no knowledge of this, sir, no recollection of it, anyway.

Mr. Miller: I have no further questions.

The Court: Thank you, Mr. Miller.

(The witness was excused.)

Mr. Charles: Now, if your Honor pleases, Mr. Miller and I, for the sake of cutting down on a lot of technical proof, have agreed that this aerial photograph which I am about to introduce in evidence is an accurate photo-[fol. 33] graph of the sand pit which is the subject matter of this litigation as it existed on March 25, 1959, and I ask that it be marked in evidence.

Mr. Miller: No objection. No objection, if your Honor pleases, except it is conceded that this is a blow-up or magnification of an aerial photograph which we presume is authentic, except that there have been added various structures and titles and words to the photograph, is that correct?

Mr. Charles: That is correct, which I will tie in to the photograph.

(Received in evidence and marked Plaintiff's Exhibit 2.)

The Court: In what area of the Town of Hempstead is this pit located?

Mr. Miller: East Meadow.

OFFER IN EVIDENCE

The Court: Mr. Charles, do you want this map on an easel, or did you just offer it in evidence?

Mr. Charles: I just offered it in evidence. I do not need it on an easel at the present time. My main point in offering it was for the purpose of showing the area.

Mr. Dinkelmeyer.

JOHN DINKELMEYER, residing at 90 Hilltop Road, Levittown, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Charles: Maybe we had better have the aerial photograph, Plaintiff's Exhibit 2, on the easel, your [fol. 34] Honor, because this is with respect to the number of children in the neighborhood attending school in the neighborhood.

Direct examination.

By Mr. Charles:

Q. Mr. Dinkelmeyer, where are you employed?
A. I am employed at the North Bellmore Public Schools.
Q. What is that commonly known as?
A. Union Free School District No. 4.
Q. In what capacity?
A. I am the district principal of the district.
Q. As district principal are you in charge of the registration records of that school?
A. Yes.
Q. They are kept under your control?
A. That is correct.
Q. They are kept in the ordinary course of business?
A. That is correct.
Q. When was the last time you had a recapitulation of the total number of students in that school?
A. May 29.
Q. 1959?
A. 1959.
Q. Will you tell us how many students there were in that school?
A. Which school are you referring to, sir?
Q. The Jacob Gunther Elementary High School.
A. The Jacob Gunther Elementary School, we have an enrollment of 600 children.
Q. I show you Plaintiff's Exhibit 2 and ask you if you recognize that school from the aerial map.
A. Yes, right here (indicating).

Q. Would you point out to his Honor where it is.
A. Yes (indicating).

Mr. Charles: Your witness.

[fol. 35] Cross examination.

By Mr. Miller:

Q. Do you know, sir, where the line is between Union Free School No. 4, your district, and District No. 3 of the East Meadow School District?
A. Yes, sir.
Q. Will you point that out, please?
A. The boundary line between the two districts runs along North Jerusalem Road through the midpoint of that road westward to Newbridge Road and then down again North Jerusalem Road down to Ennebrock Road at this point, it goes slightly south through Ennebrock, the midpoint of that road, and back again to North Jerusalem Road, over to Bellmore Avenue, approximately.
Q. If I may approach here, may I have that pointer. Am I correct, then, that no one north of Jerusalem Road, no one north of where I hold this pointer, no children would walk from any point north of this line I am drawing down to this school?

Mr. Charles: I object to that, your Honor.
The Court: I will allow it, Mr. Charles.

Q. Is that not correct?
A. Let me understand the question.
Q. You made a boundary line about here, did you not?
A. Yes.
Q. Am I correct that everything above this is District 3?
A. Correct.
Q. Therefore, any child living above this would not go to this school?
A. That is correct.
Q. Then it is correct that south or below this pointer in this area here the children would walk to this school, [fol. 36] is that it?

A. Anyone south of this road would attend either Gunther School or our Waldorf School which is located right here.

Q. And this is an elementary school, sir?

A. That is correct.

Q. What is your mileage distance? That is, how far do you have to live from this school before you qualify for transportation by bus?

A. The mileage for the first three grades is a half mile or more; for grades 4 through 6 it is one mile or more.

Q. Can you point out to his Honor where approximately the transportation would start for students attending the Gunther School?

A. The transportation we have is mainly in this area over here (indicating). We have none from this area attending this particular school. The people from this area would attend our Waldorf Avenue School over here.

Q. Sir, when you say "this area here," you are pointing to an area south of North Jerusalem Road?

A. That is correct.

Q. And to the west of Newbridge Avenue. is that correct?

A. That is right.

Q. And when you said just before "this here", as to where they are transported, you were then pointing to the lower right corner of the map where it reads "Prepared by Lockwood, Kessler & Bartlett, Inc."?

A. The question you asked was bus transportation. We do have children coming from this area who walk, but bus transportation is from this area only.

Q. Now let me ask you this, sir: Do you understand that the subject property of this lawsuit is this area here (indicating)? This sand pit?

A. Yes.

[fol. 37] Q. Is there any child attending your school district who has to walk by this sand pit to get to school?

A. No, sir.

Mr. Miller: That is all.

Mr. Charles: That is all.

(The witness was excused.)

FREDERICK SHORE, residing at 80-35 262nd Street, Floral Park, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Charles:

Q. Mr. Shore, where are you employed?
A. East Meadow Public Schools.
Q. In what capacity?
A. Administrative assistant in charge of child accounting, Government aid, and transportation.
Q. In the East Meadow School District is the Newbridge Road School, the Prospect Avenue School, and the Woodland Junior High School located?
A. Yes, those are in our district.
Q. As administrative assistant are you in charge of the registration records of all three of those schools?
A. I am in charge for the entire district. Those registration records are sent to my office, that is right, for consolidation.
Q. And they are kept in the ordinary course of business?
A. Yes.
Q. Can you tell us, when was the last time you had a recapitulation of the registration of children, of students at the Newbridge School?
A. Let me put it this way: The reports must be sub-[fol. 38] mitted monthly to my office, and the last recapitulation was completed June 15.
Q. How many children were attending the Newbridge School on that day?
A. No, sir, this is as of May 29 but it takes a little while to consolidate. So, as of May 29, 1959, there were 1,119 children in Newbridge Road School.
Q. In accordance with your records, was May 29, 1959 the last registration at the Prospect Avenue School?
A. Yes, this is standard for the whole district.
Q. On May 29, 1959, what was the registration of students in the Prospect Avenue School?
A. 1,096.

Q. At the Woodland Junior High School did you also have a recapitulation of registration on May 29, 1959?

A. Yes, sir.

Q. What was the number of students attending the school on that day?

A. 1,697.

Q. I show you Plaintiff's Exhibit 2 and I ask you to point out to the Court the location of the Woodland Junior High School.

A. This would be Woodland Junior High (indicating).

Q. That is at the westerly end of the circle that is shown on Plaintiff's Exhibit 2. Would you also show us the location of the Prospect Avenue School?

A. That is a little above, over here; slightly to the northwest, about a quarter of a mile, sir.

Q. Would you also point out on Plaintiff's Exhibit 2 the location of Woodland Junior High School?

A. We had Woodland. You mean Newbridge?

Q. Newbridge.

A. Newbridge Road School would be here generally to the east, slightly to the northeast of these two.

[fol. 39] Q. And slightly to the northeast of the portion of the exhibit marked "sand pit"?

A. Yes.

Mr. Charles: Your witness.

Cross examination.

By Mr. Miller:

Q. Mr. Shore, have you been told the size of this circle?

A. No, I haven't heard about any of the details about this before.

Mr. Miller: Mr. Charles, will you concede that the radius of that circle is 4,500 feet, according to the affidavit in this action of Mr. Ott?

Mr. Charles: No, the radius of the circle is 3,000 feet.

Mr. Miller: I believe that is what he said; maybe I read it wrong. Just a minute.

For the record, if your Honor please, the affidavit on the motion for temporary injunction, page 3, of Mr. Ott,

I read: "Heretofore and on March 25, 1959 I caused to be made an aerial photograph of the said sand pit and showed on said photograph all the public buildings and private homes within a radius of approximately 4,500 feet from the center of said sand pit. Copy of said aerial photograph is hereto annexed and marked Exhibit E."

Mr. Charles: That is correct. Off the record, that goes from here to here to here to here (indicating the four corners of Plaintiff's Exhibit 2). It is not the circle shown on there.

[fol. 40] The Court: Does the affidavit say "circle", Mr. Miller?

Mr. Miller: It says within a radius of approximately 4,500 feet, and they have drawn a circle on the map. I can only presume that radius is one-half the circle.

The Court: Let us not presume.

Mr. Miller: That is what I was asking.

The Court: The affidavit says nothing about the circle.

Mr. Miller: No, it does not say "circle", I realize that.

The Court: Under the circumstances, then, we will develop this case on the basis of evidence introduced at this trial.

Q. Mr. Shore, looking towards the northeast boundary of the sand pit (referring to Plaintiff's Exhibit 2), can you tell me, sir, where the children who live along in this section, northeast corner of the sand pit, go to school?

A. Depending on grade, they would attend the Newbridge Road School. The elementary school children would attend the Newbridge Road School.

Q. And that is this school here (indicating)?

A. Yes.

Q. And further to the northeast?

A. Yes.

Q. From where these homes are in the northeast corner of the pit?

A. That is correct.

Q. Am I correct, sir, then, that none of these children would traverse the area of the pit to go to school? The pit is away from their homes, is that not correct?

A. Where are you pointing, Mr. Miller?

Q. Take anybody, say, in the area from Newbridge Road westerly to the sand pit and the entire northeast

[fol. 41] quadrant of the sand pit looking in a northeasterly direction; am I not correct that the people would walk away from the pit to the Newbridge Road School?

A. For those children.

Mr. Charles: I object to that, your Honor, on the grounds it is an assumption.

The Court: On redirect you have Mr. Shore outline for us on the map the outline of the district.

Q. Is that correct?

A. Those children where you are pointing would attend the Newbridge Road School.

Q. That is right, sir. Would any of those children traverse the sand pit area on their way to school?

Mr. Charles: I object to that, your Honor.

The Court: He is in no position to know whether they would or not. They might go in a roundabout way. All he can say is that the homes of those children in that district lie between the sand pit and the school. From then on we draw our own conclusions, Mr. Miller.

Q. Mr. Shore, let us take the northernmost corner of the pit and going slightly to the north northwest, if you would draw a compass angle that way, so we would be about at this point; is that correct?

A. Yes.

Q. On a north northwest tangent from the pit?

A. Right.

[fol. 42] Q. Let us take grade school first, where would grade school children living in this north northwest quadrant attend school?

A. There would be a split at that point.

Q. Would you tell the Court where they would go, please?

A. Some of them would attend, in elementary grades, the Newbridge Road School.

Q. Would they be furnished bus transportation?

A. If they were below the third grade. Kindergarten, 1 and 2 would receive bus transportation.

Q. Would be picked up by bus in their dwelling area and taken to the school?

A. Along a route, yes.

Q. Along the route?

A. Yes.

Q. And above that?

A. Above that in grades 3 and above to the sixth grade they would be in the Newbridge School up to a certain street, and beyond that they might attend the Meadowlawn School, and above another grade they would be in Woodland Junior High School, or perhaps the Meadowbrook Junior High School, or East Meadow High School.

Q. Now taking the homes that lie to the west of the sand pit, I believe this is the area known as Midland Gardens, is it not?

A. Yes.

Q. Where would the grade school children attend school from Midland Gardens on the west of the sand pit?

A. I might add, to clarify it, Newbridge Avenue is the boundary line, so west of the sand pit they would be in Woodland or Prospect, in grades, depending upon what grade they are in. Woodland or Prospect.

Q. You say Newbridge Avenue, which is this long street here which goes right by the pit—right?—is the boundary [fol. 43] line?

A. Elementary area boundary line, correct.

Q. In other words, am I correct, when you say "boundary line", anyone to the south southwest, would go to these schools (indicating)?

A. Yes.

Q. Located on this diagram to the west?

A. Right.

Q. And anybody living then on the other side of Newbridge Avenue would go up to Newbridge Road School?

A. In elementary grades.

Q. In elementary grades?

A. Correct.

Q. You said the children here in Grades 1, 2 and 3 would receive bus transportation?

A. K, 1 and 2.

Q. The first three grades includes kindergarten?

A. Right.

Q. What is your distance requirement or policy with respect to providing transportation?

A. Grades kindergarten, 1 and 2, over a half a mile; Grades 3, 4, 5, 6, over a mile; Grades 7 to 12, over a mile and a half. Bus transportation is provided if the children reside in those grades in excess of those distances from school.

Q. Are you personally familiar with Newbridge Avenue in the vicinity of the sand pit?

A. Yes, sir.

Q. Along the northeasterly side, that is the side where the pit is on Newbridge Avenue, are there sidewalks constructed?

A. Not all the way up and down. Generally, there are some sidewalks.

Q. Are there sidewalks on the southwesterly side of Newbridge across the street from the sand pit?

A. I would say generally yes, but here and there there may be none.

[fol. 44] Mr. Miller: No further questions.

COLLOQUY

Mr. Charles: Mr. Miller, it is stipulated that if the pastor of St. Raphael's Church, which is located on Plaintiff's Exhibit 2 at a point directly east of the east side of the southern part of the pit, were called, he would testify that 3,500 pupils receive weekly religious instructions in each week. Is that correct?

Mr. Miller: I will make that concession. When you say "weekly", are they in attendance every day?

Mr. Charles: Let me put it another way: that in each week 3,500 pupils receive religious instruction over the week—strike that out.

The Court: Is that 3,500 separate individuals?

Mr. Charles: 3,500 separate individual children receive religious instruction during one week at St. Raphael's Church.

Mr. Miller: Off the record, I am trying to understand this. Do you mean, for instance, an average of 700 a day,

some come once a week, some twice a week, some three times a week? Is that it?

Mr. Charles: That is right.

Mr. Miller: But are there 3,500 separate children?

Mr. Charles: No.

Mr. Miller: Then there would not be 3,500 separate children.

Mr. Charles: For instance, on Sunday they may have 800; then they have religious instruction for the high school children at night, they may have 300 for the high [fol. 45] school children not attending parochial schools, and he did tell me that the average was 3,500 pupils in a week.

Mr. Miller: Mr. Charles, if you would repeat that on the record I will take that.

The Court: Then, to help Mr. Miller, you would say that was about 700 per day?

Mr. Charles: Yes, sir.

Mr. Miller: I will take your previous statements if you would put them on the record now as to the explanation of the gross figure of 3,500.

Mr. Charles, as to just one statement which you made, when you located the approximate distance of the church to the pit I believe you said at the corner of the pit. I would like the record to indicate that it is some distance down Pendroy Street that the church and school are located on the corner of Newbridge Road, which is State Highway 106.

If your Honor please, the church is located on the corner of Newbridge Road, State Highway 106 and Pendroy Street, which is some distance down to the end of Pendroy Street and then some other land toward the pit. I think Mr. Charles inadvertently said the church is located at the northeast corner of the pit.

The Court: All right.

Mr. Charles: It is approximately 600 feet east of the pit.

Mr. Charles: No more questions.

Mr. Miller: No further questions.

(The witness was excused.)

[fol. 46] FREDERICK C. OTT, residing at 1 Irene Lane North, Plainview, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Charles:

Q. Mr. Ott, what is your profession?
A. A land surveyor.
Q. Are you licensed by the State of New York?
A. I am.
Q. How long have you been so licensed?
A. Twenty-eight to twenty-nine years.
Q. Where are you employed at the present time?
A. Lockwood, Kessler & Bartlett.
Q. Where are they?
A. Syosset.
Q. Of Syosset, Long Island?
A. That's right.
Q. How long have you been employed by Lockwood, Kessler & Bartlett?
A. Seventeen years.
Q. Are they registered professional engineers and land surveyors in the State of New York?
A. They are.
Q. Did you, Mr. Ott, supervise the making of topographical survey on the premises known as Section 50, Block L, Lot 9, on the land and tax map of the County of Nassau?
A. I did.
Q. Mr. Ott, I show you this paper and I ask you what it is. Will you describe it to the Court.
A. This is a plotting of the topographical survey of the sand pit located in East Meadow, plotted from actual field notes which were obtained from March 26 to April 9, 1959. This survey indicates elevations on the surface of the ground and also elevations taken in and on the bottom of the pit below water.
Q. Was that survey made under your personal supervision?
A. It was.

[fol. 47] Q. Is it an accurate portrayal of the conditions you found on the dates that you have set forth on which the survey was made?

A. It is.

OFFERS IN EVIDENCE

Mr. Charles: I offer it in evidence.

Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibit 3.)

Q. Did you also prepare at the time you made that survey, Mr. Ott, an index of cross-sections?

A. We did.

Q. Have you got those with you?

A. I have.

Q. I show you these papers and ask you if that is an index of the cross-sections.

A. Yes, this is the index to cross-sections with the cross-sections attached to it.

Q. Are they an accurate transcription of your field notes?

A. They are.

Mr. Charles: I offer the cross-sections in evidence.

The Court: Do you want to say something to Mr. Charles?

The Witness: Yes, about the previous exhibit.

The Court: We will wait until Mr. Miller finishes looking at it and then Mr. Charles will ask you a question.

Mr. Miller: I have no objection.

That is twelve sheets as one exhibit?

Mr. Charles: Yes.

(Received in evidence and marked Plaintiff's Exhibit 4.)

[fol. 48] Q. Mr. Ott, I show you Plaintiff's Exhibit 3 and I call your attention to the line on the east side of Newbridge Avenue which says 6 foot high cyclone fence, and I ask you if that cyclone fence is on the property line of the property which is the subject matter of this action.

A. Yes.

Q. Now I call your attention to cross-section marked Section A, Plaintiff's Exhibit 4, and I ask you if the slope of the pit as shown on Section A exceeds a maximum slope of one foot vertical on two foot horizontal?

A. It does, in part.

Q. Does it show whether or not the pit is over 10 feet in depth below the existing road grade?

A. It does.

Q. To what extent?

A. On Section A the depth is 48.6 feet from the existing road grade to the bottom of the pit.

Q. How far below grade is it to the ground water elevation?

A. 15.4 feet.

Q. So that at that point the depth of the water in the pit is 33.2 feet, is that correct?

A. That is correct.

Q. I call your attention to Section C of Exhibit 4, and I ask you whether the start of the slope of the pit is within 20 feet of the property line as shown by the 6-foot cyclone fence.

A. It is.

Q. To what extent?

A. The distance from the top of the slope, beginning of the embankment, to the fence on the property line is 17 feet.

Q. Is the bottom of the pit at that point more than 10 feet below the grade of the nearest street?

A. It is.

Q. What is the depth of the pit?

[fol. 49] A. The depth of the pit below the existing road grade on Section C is 59.7 feet.

Q. Is the pit at that point below the maximum ground water level as fixed? I will withdraw that.

Is the bottom of the pit there as shown on Section C below the ground water elevation?

A. It is.

Q. To what depth?

A. 40.1 feet.

Q. What is the depth of the water at that point?

A. The same: 40.1 feet.

Q. I direct your attention to Section E of Plaintiff's Exhibit 4, and I ask you if the start of the slope is within 20 feet of the nearest property line?

A. It is less than 20 feet.

Q. How far is it from the property line?

A. 10 feet.

Q. I ask you whether on Section C the bottom is deeper than 10 feet of the existing road grade.

A. The bottom of the pit is greater than 10 feet below the existing road grade.

Q. What is the depth of the bottom of the pit?

A. Below the existing road grade?

Q. Below the existing.

A. 59.7 feet.

Q. Can you tell us what the depth of the water is at that point?

A. 40.1 feet.

Q. I call your attention to Section F, and I ask you whether or not the slope begins within 20 feet of the nearest property line.

A. It is less than 20 feet from the property line.

Q. What is the length?

A. 13 feet.

Q. Now I call your attention to the slope of the pit and ask you whether or not that exceeds a maximum of 1 foot vertical to 2 foot horizontal.

A. It does.

[fol. 50] Q. I also ask you whether or not the bottom of the pit exceeds the ground water level.

(The question was read.)

Q. Is deeper than the ground water level.

A. Oh, yes. "Yes" to the last question.

Q. What is the depth of the pit as shown on Section F?

A. The depth of the pit below the existing road grade is 52.6 feet.

Q. Can you tell us the depth of the water in that pit?

A. On Section F?

Q. On Section F.

A. The depth of water is 37.0 feet.

Q. I call your attention to Section G, and I ask you whether or not the slope of the pit exceeds a slope of more than 1 foot vertical on 2 foot horizontal.

A. It does in part.

Q. And the part where it does not exceed 2 feet horizontal and 1 foot vertical, is that land under water?

A. That is.

Q. Is the land that is shown on Section G of Plaintiff's Exhibit 4 below the existing road grade?

A. It is.

Q. To what depth?

A. 62.1 feet.

Q. At that point what is the depth of the water in the pit?

A. 48.3 feet.

Q. I call your attention to Section J, and I ask you if the slope of the pit as shown on that section exceeds a maximum slope of 2 foot horizontal on 1 foot vertical.

A. It does in part.

Q. Does it also show whether or not the bottom of the pit is 10 feet below existing road grades?

A. It does.

Q. What is the depth of the pit at that point?

A. 50.7 feet below the existing road grade.

[fol. 51] Q. What is the depth of the water at that point?

A. 35.2 feet.

Q. I call your attention to Section K of Plaintiff's Exhibit 4, and I ask you if the slope of the pit begins within 20 feet of the nearest property line.

A. It does, less than 20 feet.

Q. Is the depth of the pit more than 10 feet below the existing road grades?

A. It is.

Q. What is the depth of the pit at that point?

A. 49.6 feet.

Q. What is the depth of the water at that point?

A. 34.1 feet.

Q. Now I show you Plaintiff's Exhibit 3 and I ask you whether or not the land lying between the lines marked "water line" on the east and "water line" on the north and "water line" on the west and "water line" on the south are the periphery of the pit, the part of the pit in which there is water.

A. Yes.

Q. What is the area of that part of the pit that was land within those water lines?

A. 20.2 acres.

Q. In the center of that land lying between those water lines you have a quotation which reads, "Water elev. 50.2." Will you tell the Court what that means as applied to Plaintiff's Exhibit 3.

A. "Water elev." denotes water elevation of 50.2 feet, which was obtained by running levels with instruments by our survey crews from bench marks established by the Nassau County. The elevations are referred to the basic datum of Nassau County, which is the same as mean sea level at Sandy Hook or the United States Coast & Geodetic Survey datum. Any number on there denotes the elevation of that specific point; and if it were to read as, for example, the surface of the water 50.2, it means that the water sur- [fol. 52] face of the pond in the pit at the time we made the survey was 50.2 feet above mean sea level at Sandy Hook, or 50.2 feet above the datum of Nassau County.

Q. In a layman's terms, is that the point at which ponds start to form out of the surrounding lands?

A. I am sorry, I would like to have that question repeated.

Q. I will withdraw it. Based upon that, can you tell us whether or not the land lying within the two lines are 2 feet above the mean water level of the Town of Hempstead at this point?

A. By the elevations shown within the edges of the water, I can tell that no points within the water lines are 2 feet above the ground water surface in Nassau County at this point.

Mr. Miller: If your Honor please, I did not quite understand that. Could I have that answer read back, please?

(The answer was read.)

Q. From Plaintiff's Exhibit 3 and from the lands lying within the lines as shown on Plaintiff's Exhibit 3, called "high water line," can you tell us whether an excavation has been made which is below 2 feet above the maximum ground level water level as shown on the survey?

Mr. Miller: If your Honor please, could we just suspend for one minute. The question used the words "high water level." Could you show me where you mean high water level?

Mr. Charles: Off the record.

(Discussion off the record.)

[fol. 53] Mr. Miller: Just for the record, then, you will amend the question to take the word "high" out of it, is that right?

Mr. Charles: Right.

Q. Is the excavation shown between the lines marked "water line" below 2 feet above the maximum ground water level at the site?

A. It is.

Q. What is the average depth of the water on the lands shown between the water lines on Plaintiff's Exhibit 3?

A. About 25 feet.

Q. Mr. Ott, at the time you made this survey did you make an inspection of the fence around the pit?

A. I did.

Q. Did you find any concrete curb under the fence supporting the fence?

A. I did not, except for concrete around the posts.

Q. But between the posts there was no concrete curb?

A. That is right.

Q. At the time you examined the fence did you find any holes under the fence?

A. I did.

Q. Did you cause to be taken any photographs of those holes in the fence?

A. I did.

Q. Were you present at the time the photographs were made?

A. I was.

Q. I show you these two photographs and I ask you if they are an accurate representation of the holes under the fence that you saw at the time the photographs were taken.

A. They are.

Mr. Charles: I ask that they be marked in evidence.

Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibits 5A and 5B, respectively.)

[fol. 54] Q. At the time you made this survey were you also present when certain photographs were taken of the pit?

A. I was.

Q. I show you these twenty-two photographs, and I ask you if they are accurate representations of what you saw on the day the photographs were taken.

A. They are.

Mr. Charles: I offer them in evidence.

I think they ought to be marked separately.

(Received in evidence and marked Plaintiff's Exhibits 6A through 6V, respectively.)

Q. Mr. Ott, I call your attention to sheet 1 of Plaintiff's Exhibit 4, and did you at my request locate the point where each of these photographs was taken.

A. I did.

Q. Did you coordinate the photographs with the number as shown on sheet 1?

A. We did.

Q. Where the dot is was where the photograph was taken?

A. Yes.

Q. And the arrow points to the direction in which the camera was pointed?

A. That is right.

Mr. Charles: If you look at the last, your Honor, just for the sake of convenience you see that number, the last number on the right on the upper part.

The Court: 59-20-15.

Mr. Charles: If you look at Section 1 of Plaintiff's Exhibit 4, you will see a numeral 15 at Everett Place, and that is where the photograph was taken. The arrow is the [fol. 55] direction in which the camera was pointed at the time the photograph was taken.

The Court: So that if I take Exhibit 4 and look for the number, as on this one, 6A, and find the upper right-hand corner the number 5920-15, that 15 will be the same number as on this first sheet of Exhibit 4.

Mr. Charles: That is correct, sir. You always get into controversy as to where the camera was and who took it and where it was, and I thought it would be much simpler to present it in this manner.

The Court: All right. Have you done this or had this done for each one of these photographs?

Mr. Charles: Yes, sir.

The Court: That is your understanding too, Mr. Miller?

Mr. Miller: Yes, except that I do not have a sheet with the arrows on it. If you have an extra one, it will be easier for us to find.

Mr. Charles: Yes, we have an extra one.

Q. Mr. Ott, you are also familiar with Plaintiff's Exhibit 2 which is the aerial map?

A. Yes.

Q. Will you tell the Court the radius of the circle as shown by the yellow line on Plaintiff's Exhibit 2?

A. Yes, the radius of the yellow line is 3,000 foot.

Q. Is it 3,000 foot from the center of the sand pit?

A. That is right.

Mr. Charles: Your witness.

[fol. 56] Cross examination.

By Mr. Miller:

Q. Mr. Ott, would you point out for me, please, what point you considered in the sand pit for the center of that circle?

A. Right here.

Q. About at this point?

A. That is right.

Mr. Charles: Let him identify it.

The witness marked it.

Mr. Miller: The witness marked just above the letter C in the word "Block" on the island of land sitting in the center of the lake.

Mr. Charles: With the red crayon.

Q. Mr. Ott, you said you made an examination of the fence which encloses this sand pit, is that correct?

A. That is right.

Q. And you found several openings underneath that and took Exhibit 5A and 5B?

A. That is correct.

Q. And the holes as shown on those exhibits, is that the condition that you found in the land as you came by that point?

A. That is correct.

Q. Were those the only such conditions you found? I mean did you traverse the whole perimeter of the pit?

A. I traversed the whole area of the pit and those were the ones that I found.

Q. You did not find any others, in other words?

A. No.

Q. How many linear feet of fence surround this thirty-eight-acre sand pit?

A. About a mile.

Q. Do I take it, then, approximately 5,300 feet of fence?

A. That is about correct.

Q. I am correct, then, in 5,300 linear feet of fence you found two holes under the fence?

A. Yes.

[fol. 57] Q. Would you look, please, at Plaintiff's Exhibits 5A and 5B. Is it not correct that there is a ruler or measuring stick shown in the photographs to graphically illustrate the depth of the hole?

A. That is right.

Q. And in Exhibit 5A, which is the one with the metal bar, it looks like, also in the picture—is that correct?

A. That is 5B, I am sorry.

Q. All right, take the one with the bar.

A. That is 5B.

Q. In Exhibit 5B, the one with the crossbar, what is the depth of the hole at the point that the ruler is?

A. Approximately 10, 11 inches.

Q. Looking slightly to the left of the ruler as you look at the photograph, does not the land slope up to the concrete base of the fence post?

A. It does.

Q. So that if the ruler were held to the left, the distance would be shorter, the hole would be smaller underneath the fence, would it not?

A. That is right.

Q. Would you point that out to his Honor, please, as you are testifying.

A. Yes.

Q. Now going to the right of that stick, does not the hole also lessen in depth as you work your way up the slope of the other side of the hole?

A. That is correct.

Q. In other words, you measured it with the measuring device or ruler at the deepest point or center of the hole?

A. I did.

Q. Did you lie down on the ground next to that fence, Mr. Ott?

A. No, I didn't.

Q. Do you know of your own knowledge the size of a hole that would be necessary for you to draw your body under the fence?

A. Me?

[fol. 58] Q. Yes.

A. Yes.

Q. Approximately how much, sir?

A. It would be controlled by the diameter of my head, and my head, I guess, is about—I wear a 7¼ hat, so that I could crawl through this hole if this pipe was not there.

Q. Do I take it, then, sir, that the size of your shoulders would have nothing to do with the size of the hole under the fence? You said determined by your head, did you not?

A. That's right.

Q. Am I correct, then, that the size of your shoulders would have nothing to do with your ability to get under that hole?

A. This specific hole, my shoulders could fit under, because the hole, as you have just described, was 10 to 11 inches deep at its deepest part, then sloped up on each side of it; so that I, though I didn't get down on my belly

and crawl through here, could have crawled through this hole, there would have been sufficient room.

Q. Do you know, sir, how wide your shoulders are?

A. Well, I never measured my shoulders.

Q. There is a rule here, sir.

Mr. Miller: Would you hand this to the witness, please.

The Witness: You read it.

Mr. Miller: All right. Mr. Charles, would you come here. What would you make that out to be? Shall we call it 18?

Q. All right, sir, we have just measured your shoulders and come to a conclusion that it is approximately 18 inches from left to right. Now I ask you, sir, looking at Plain-
[fol. 59] tiff's Exhibit 5B in evidence, what the dimensions of the hole are from left to right as you look at the hole of a depth sufficient for your head and shoulders to fit underneath the bottom rung of the fence.

A. There is a rule standing vertically here; it is opened at 1 foot. I would say that the width of the hole at the top would be 2 feet and it would vary down to foot and a half at the bottom.

Q. On Plaintiff's Exhibit 5B in evidence where does the bottom rung—when I say "rung," I mean the two points of fence wire which are twisted together and then end—do you follow me?

A. Yes, I do follow you.

Q. Each one comes down into a little stick, like, where two strands are coiled together.

A. The fence at this particular point, and this is called a chain-link fence, the bottom of it was bent inward, inward being towards the pit, and I think you can see it in the picture.

The Court: The witness is showing me the fence at the bottom, how it turns in.

Q. So that is it not correct, sir, that the bottom-most portion of the fence—I am not talking about the post; I am talking about these little points which stick down—when they hang in their normal position as to the left of

where you just described, the depth of the hole is substantially less than what you have shown with that measurement? Is that not correct?

A. Yes.

Q. In fact, sir, from this photograph would you say that that measuring stick was held in a perfectly perpendicular way, or is it on an angle?

A. The picture indicates that it is slightly out of perpendicular.

[fol. 60] Q. If it were perfectly perpendicular forming a 90-degree angle at the bottom of the hole, would not the distance be less than that shown?

A. You are speaking theoretically?

Q. Assuming that you held it in a—

A. Because we are measuring to a fence which has knurled bottoms or points, and the rule was put in such a manner as to give a comparison of size, of recognizable size. But if that were brought into perpendicular, the difference in the measurement would be so infinitesimally small it would be—because it is only about three-eighths of an inch out of plumb.

Q. At the time you came up to this spot to take this picture was this pipe there?

A. It was.

Q. Did you find that there?

A. It was.

Q. And that pipe, the portion which is going through the fence, is fastened to the crossbar which is shown on other side, is it not?

A. That is right.

Q. In so far as your ability to crawl under that fence, would not that bar take up part of the hole?

A. Oh, yes.

Q. In fact, sir, had you been so inclined at the time you saw the representation shown on this photograph, could you physically have gone through there?

A. While the pipe was there?

Q. Yes.

A. No.

Q. Will you look at the other photograph, please, Exhibit A, and am I correct there, sir, that the measuring

device is placed at the greatest depth of the hole?

A. Not in this particular case, as I look at the picture.

Q. Where is it greater?

A. Brought over to the left it would have represented a slightly greater dimension of hole.

[fol. 61] Q. Is it not a fact, sir, that to the left the prongs extend further down?

A. That is correct.

Q. And that would narrow the size of the hole, would it not?

A. That is correct.

The Court: What number picture are you looking at now?

The Witness: Exhibit 5A.

Q. Mr. Ott, did you in the past week visit the sand pit?

A. I did.

Q. Did you request permission to examine the area?

A. I didn't request permission.

Q. Did you have a conversation with anybody there at the time?

A. I did.

Q. With whom was that conversation?

A. Mr. Goldblatt.

Q. What did you say to him and what did he say to you?

A. I indicated to Mr. Goldblatt that I was entering upon the property.

Q. Did you ask permission to enter?

A. Well, no, I didn't ask permission. It was a gesture of notifying the owner that I was going on the property.

Q. And he did not stop you, is that correct?

A. No, he didn't stop me.

Q. Did you examine the property?

A. I did.

Q. Did you examine around the periphery of the fence?

A. I did.

Q. Did you find any holes?

A. I did not.

Q. When for the first time did you ever visit the sand pit in East Meadow?

A. March 23, 1959.

Q. Did you have a conversation at that time with Mr. Goldblatt?

A. I did.

[fol. 62] Q. Did you tell him the purpose of your visit?

A. I did.

Q. What did you say to him and what did he say to you?

A. I said to Mr. Goldblatt, "We have been retained by the"—

Q. When you say "we," would you tell what you mean by "we"?

A. The firm I work for.

Q. All right.

A. "We have been retained to make a survey of your sand pit, and have we your permission to enter upon the premises." To the best of my memory, Mr. Goldblatt said, "Who are you working for?" And I said, "It is for Nassau County and/or Town of Hempstead."

He then requested that we get a letter from the owner indicating the purpose of the survey. That is the first visit to the sand pit.

Q. Did you deliver a letter to him, Mr. Ott?

A. Yes, the next day—hold it, March 25, I again saw—no, we didn't see Mr. Goldblatt; we saw his secretary. And we gave his secretary a letter which was written by Mr. Clarence Southard of the Nassau County Department of Public Works.

Q. Let me get one thing straight on the record. Who retained you to do any services at this sand pit?

A. Nassau County.

Q. Now I took it a minute ago you said Nassau County and/or Town of Hempstead. Did Town of Hempstead ever retain you on this?

A. At the beginning, March 3 was the first indication that we had that surveys were wanted at this pit.

Q. Did that indication come to you personally?

A. From the particular person who called me, yes.

Q. Who was the person who called you?

[fol. 63] Mr. Charles: I do not want to object, your Honor, but I think this is improper cross-examination.

The Court: I will allow it.

Mr. Charles: Exception.

A. Mr. Frank Merklin of the Nassau County Department of Public Works.

Q. He was the first person that ever called you and mentioned East Meadow or Goldblatt's pit?

A. That is right.

Q. What did he say to you at that time?

A. He said, "We want to have surveys of the pit."

Q. Did he mention any reason why he wanted surveys?

A. No.

Q. Were those the instructions under which you operated to go out three weeks later and do this work, that conversation with Mr. Merklin?

A. Two days later.

Q. I thought you said March 3.

A. No, I said March 23.

Q. I am sorry, then, I misunderstood you. It was March 23 Mr. Merklin called you?

A. That is right.

Q. And on the 25—

The Court: Mr. Miller, may I interrupt. Would you find a convenient time without interfering with your cross-examination to stop.

Mr. Miller: I can stop right now.

The Court: Suppose you stop right now.

Mr. Miller: There will not be any point where it will be easier.

The Court: We will recess until tomorrow morning.

[fol. 64]

Mineola, New York
June 17, 1959

Appearances as heretofore noted.

FREDERICK C. OTT resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Cross examination.

By Mr. Miller (continued):

Q. Mr. Ott, when we suspended yesterday, I believe about the last question concerned the hiring of you—when I say "you" I mean your firm, Lockwood, Kessler & Bartlett—in connection with survey of the subject property of this lawsuit. As I recall, sir, about your last answer was that this hiring first was initiated, to your recollection, by the telephone call with Mr. Merklin of the Department of [fol. 65] Public Works of the County of Nassau. Is that correct?

A. That is correct.

Q. Would you tell the Court, please, what Mr. Merklin said to you and what you said to him in that conversation concerning this property?

A. Mr. Merklin outlined the survey that he desired we make of the sand pit. Specifically, he requested that we make a topographical survey of the entire pit, taking elevations at and on 50-foot grid intervals, which included taking soundings in the pond in the pit.

Q. Was that the sum and substance of your hiring?

A. That was the sum and substance of the request for the survey.

Q. Were there any other conversations with any other gentlemen at the Department of Public Works concerning the services that you were to render at the sand pit?

A. No, my entire talks were with Mr. Merklin.

Q. I believe also that you testified yesterday, if I am correct, that you went to the property of the defendant

Goldblatt not as a private consultant but in the nature of an agent of the County, Department of Public Works, and you delivered a memorandum at that time, did you not?

A. That is right.

Q. I show you a piece of paper and ask you, sir, if you can identify it as the paper which you delivered at that time.

A. This paper is the paper I delivered.

OFFERS IN EVIDENCE

Mr. Miller: I offer it in evidence.

The Court: When you say he went as an agent, you mean merely to deliver this document and that is all.

[fol. 66] Mr. Miller: No, as an agent of the County of Nassau.

The Court: That is a conclusion that you cannot ask.

Mr. Miller: I was recalling his testimony of yesterday, Judge.

The Court: He used the word "agent" yesterday?

Mr. Miller: I thought he said they went as agents of the County. Maybe I am wrong. The letter was—I will withdraw the word "agent". The letter reads "as associates of this Department," and it is the Department of Public Works.

I will withdraw the word as not having my memory control what was said, if your Honor please.

Mr. Charles: I object to the letter, your Honor, on the grounds that it is improper cross-examination and it is immaterial and irrelevant.

The Court: I suppose at this moment, Mr. Miller is making the witness his own on this issue. I will allow it.

Mr. Charles: Exception.

(Received in evidence and marked Defendant's Exhibit A.)

Q. After the delivery of Defendant's Exhibit A to the Goldblatts or someone in charge of the property, I believe you said the secretary, you then commenced your services, is that correct?

A. That is correct.

Q. To whom did you render the exhibits, 2 the aerial photograph, 3 the topographical map—these are plain-
[fol. 67] tiff's exhibits—4, the cross-sections, 5A and 5B, the perimeter fence shots, and Exhibit 6, the twenty-two photos? To whom were those delivered, sir, after they were completed?

A. They were delivered both to Mr. Richard Charles and to the County, with perhaps the exception of the photographs, yes, excepting the photographs.

Q. When you say Mr. Richard Charles, are you referring to the Special Counsel for the Town in this proceeding?

A. I am.

Q. At whose direction was a copy of the papers delivered to Mr. Charles?

A. Well, I don't know the particular person, but I would presume it was Mr. Merklin.

The Court: Do you know, Mr. Ott?

The Witness: I do not.

The Court: Then you do not know.

Q. As far as you know personally, the only one you dealt with was Mr. Merklin over at the Department of Public Works?

A. No, later on I dealt with Mr. Charles, too.

Q. In other words, I mean prior to Mr. Charles' entry into the picture.

A. I dealt with Mr. Merklin.

Q. Now I show you two photographs marked 17 and 18 and ask you if they are part of the same series of photographs which you took of which Plaintiff's Exhibit 6, twenty-two photographs, we have in evidence.

A. They appear to be; not bearing the stamp of the company I am employed by, I can't say that they are.

Q. Do they appear to be?

A. They appear to be, yes.

[fol. 68] Mr. Miller: Mr. Charles, may we stipulate for the record those were delivered to me by your associate this morning?

Mr. Charles: Yes.

Mr. Miller: I offer these in evidence.

Mr. Charles: No objection.

(Received in evidence and marked Defendant's Exhibits B-1 and B-2.)

Q. I show you a piece of paper, sir, and ask you—

The Court: Excuse me, would you mind having Mr. Ott tell us what these pictures represent?

Mr. Miller: Surely.

The Court: Otherwise they are just pictures.

Mr. Miller: All right, Judge.

Q. Mr. Ott, would you please take Plaintiff's Exhibit 4 in evidence, which is the cross sections and the index. Those were, I believe, shots 17 and 18, were they not?

A. Yes, they are so marked.

Q. According to your index to sections here, 17 appears just north of Everett Place, and 18 appears looking northerly in the same spot, does it not?

A. That is correct.

Q. Would you please, having reference to Plaintiff's Exhibit 4 in front of you, point out to his Honor just where those pictures were taken and what they show.

The Court: I think we have enough now. You point out that these are shots 17 and 18. All right.

[fol. 69] Mr. Miller: On the index of photos on the first page of Plaintiff's Exhibit 4.

The Court: I have enough identification now.

Q. Mr. Ott, these pictures portray, do they not, the berm or the perimeter of the pit from the point of excavation to the fence?

A. That is right.

Q. At that location?—

A. That is right.

Q. —as shown on the index. And having reference also to Plaintiff's Exhibit 4, would you tell me, sir, with reference to shot No. 18, and referring to sheet no. 5 or "D" of the cross sections, would you tell me the width of the berm as shown in shot No. 18?

A. A clarification of that question: Are you asking me for the width of the berm in this picture? You referred to 18.

Q. Yes. If I understand you correctly, and your index, shot No. 18 shows a northerly view taken from a point just north of Everett Place?

A. That is right.

Q. And looking with the arrow pointing to 18, you see just above it on your index sheet 5-D?

A. That is right.

Q. I would presume, therefore—tell me if I am right or wrong—that if you then looked at Section "D" of your cross sections, you would see the width of the berm as predicted in that photograph, would you not?

A. In the distance.

Q. Would you tell me, referring to Section "D," the width of the berm as shown in the distance there?

Mr. Charles: I object to that, your Honor, on the ground that it is immaterial and irrelevant.

[fol. 70] The Court: I will overrule your objection, Mr. Charles.

Mr. Charles: Exception.

A. The width of the berm as shown on Section "D" is 25 feet.

Q. You were questioned yesterday on direct examination with respect to the distances as shown on your cross sections from the fence to the point of excavation, and there was a series of questions as to whether the distance was less than 20 feet. Do you recall those questions?

A. I do.

Q. On your various cross sections you have depicted a 20-foot "min.", which I presume is minimum?

A. That is right.

Q. I ask you, sir, where did you get the term "minimum" for the 20 feet? What does that have relation to?

A. That has relation to the ordinance of the Town of Hempstead.

Q. You are referring to Ordinance No. 16 which is Plaintiff's Exhibit 1 in evidence?

A. I am.

Q. I show you that exhibit and ask you, sir, if you are referring to the provision of Section 4a.

A. I am.

Q. Do you know, sir, of your own knowledge, or can you refresh your recollection if you have to, when that provision first took effect?

A. I do not know.

Q. Do you have any knowledge as to whether there was ever a different provision in effect under a prior ordinance?

A. I do not know.

Q. Mr. Ott, I show you a notice to admit, which by way of clarification is a paper served by the defendant which the plaintiff has admitted in this action for the purpose of this action, that the ordinances attached thereto are true [fol. 71] and correct ordinances, and I ask you to look at the first ordinance which bears a date May 20, 1941. Do you see that, sir?

A. I do.

Q. That is denominated Article XVII of the Building

A. It is.

Code of the Town of Hempstead, is it not?

Q. I would ask you, sir, to direct your attention to Section 3 of that ordinance, and I pose the question to you, sir, that, having that ordinance in front of you—which is admitted for the purpose of this action—was there a prior provision of a dimension other than the 20 feet as specified in Plaintiff's Exhibit 1?

Mr. Charles: I object to that.

The Court: Mr. Miller, whether there is an objection or not, what is a question of law and what is a question of ordinances is a matter completely within the province of the court. This man is merely a member of a surveying firm.

Mr. Miller: I will withdraw the question.

Q. Mr. Ott, who told you to base your cross sections on a 20-foot minimum?

A. On a 50-foot—no, wait a while.

Q. I am referring to your notation on top of each cross section where you show the distance between the fence and the commencement of excavation, which you have denominated as minimum. Now I ask you, were you told to do that in the preparation of your papers?

A. I was.

Q. Or is that something you did automatically by yourself?

A. That is something which we developed on the basis of having been furnished a copy of the town ordinance.

[fol. 72] Q. Were you asked to show the minimum distance on each cross section?

A. No, not specifically. In the development of a portrayal of facts, which those sections indicate, we considered it advisable to show that 20-foot minimum, based upon the ordinance requirements.

Q. Also shown on your cross sections, Mr. Ott, there is a dotted line which bears a notation "2 over 1 max. slope" —I presume that is "maximum"; right?

A. Right.

Q. I ask you, sir, where or in what manner did you derive the term "2 on 1 max. slope"?

A. From the ordinance.

Q. That is the ordinance presented to you at this time, the current ordinance in effect?

A. The current one, not this one.

Q. You made no inspection of any prior ordinances, is that correct?

A. I did not.

Q. Would you examine, please, your cross sections, Mr. Ott, and tell me if there is any place where the distance between the fence and the commencement of excavation is less than 10 feet?

Mr. Charles: I object to that on the ground it is immaterial.

The Court: I will allow it.

Mr. Charles: Exception.

A. There are none in the sections.

Q. There are none in the sections?

A. Less than 10 feet.

Q. Thank you. Mr. Ott, if you were to use the phrase "within 10 feet," would I be correct that that means, if you used it, less than 10 feet?

A. That is correct.

Q. Mr. Ott, would you look at page 3 of an affidavit [fol. 73] signed "Frederick C. Ott" and sworn to April 23,

1959, before Mr. Mattison, associate counsel at the table here, particularly the first full paragraph on that page, and I quote now: "As appears from Exhibit B hereto annexed, and especially from Sections 'C', 'E', 'F' and 'K', the pit excavation is within 20 feet of the property line. In fact, as shown on Section 'E' of Exhibit B, the excavation commences within 10 feet of the property line at one point." Did I read that correctly, sir?

A. You did.

Q. Now I would ask you, sir, at this time, was that statement true when you made it?

Mr. Charles: I object to that, your Honor.

Mr. Miller: Cross examination, Judge.

Mr. Charles: It is merely argumentative.

The Court: I know it is cross examination.

Mr. Charles: Argumentative and improper cross examination.

The Court: I will allow it.

Mr. Charles: Exception.

Mr. Miller: Question withdrawn.

Q. That was a sworn affidavit, was it not?

A. At the time I signed this affidavit I swore to it.

Q. And your signature appears on the next page, does it not?

A. That is correct.

Q. Your testimony a few minutes ago was that there are none of the cross sections that show any place within 10 feet; is that not a fact?

A. Yes, on the interpretation of "within."

Q. Now I ask you, sir, when was it correct, your testimony today that there are no cross sections within 10 feet, [fol. 74] or your sworn statement in the affidavit that at one point shown on Section "E" of Exhibit B the excavation commences within 10 feet?

A. Might I answer that?

The Court: If you can, if you understand the question.

A. I think I do.

The Court: Then answer it.

A. And it is in the interpretation of the word "within."

Q. Did I not ask you— A. And the interpretation you made of the word "within."

Q. Mr. Ott, I do not want to quibble over words. Did I not ask you before—

The Court: No, we are not going to quibble; we are not quibbling. Mr. Ott is going to answer the question.

A. The measurements as indicated on the cross sections to the top edge of the slope embankment are shown to the nearest foot. Surveyors when indicating a measurement to the nearest foot imply that the accuracy of the measurement is within a half a foot either way of that nearest foot. So the usage of the word in this affidavit, "The excavation commences within 10 feet," is perhaps broadly used, as I have described when a surveyor shows a measurement to the foot. If he desired to be more accurate and if his measurements warranted such accuracy, he would indicate the nearest tenth of a foot, and that would imply [fol. 75] that that measurement was within a tenth either way of that measurement. Have I clarified that "within" as used in the affidavit could be entirely correct, because 9.9999 to infinity is still within or below 10 feet.

Q. Sir, do I take it that you have an independent recollection that this Section "E" was something less than a full 10, even be it 9.999 to infinity? Is that your testimony, sir?

A. My testimony is, on the basis of the cross sections we prepared, that as a land surveyor we do not indicate right on the sections anything which might be construed as being more accurate than it really is, and this was specifically shown at my direction to the nearest foot, because the edge of a bank is not a definite line, it varies slightly.

May I bring to your attention that the elevations are shown to the nearest tenth of a foot, the elevations, say, on Section "G", or any one of them, which implies that we have taken those elevations to accuracies within a tenth of a foot.

Q. You say you go to the nearest foot. What is the point of change? If it is, say, 9.51, does it become 10, or if it is 9.49 does it go back to 9?

A. Just about that, yes.

Q. Therefore, when you put 10 feet on Section "E" it could have been 10.1 or 10.2 just as well as 9.8 or 9.9, could it not?

A. Correct.

Q. Mr. Ott, I show you Plaintiff's Exhibits 5A and 5B in evidence, which are the pictures of the fence, and I ask you, did you have any knowledge as to who made those holes?

A. I did not.

Q. I would ask you, sir, if you will look at the affidavit —do you still have it in front of you?—on the motion, and look at the sentence just before the paragraph I read you before, and I read: "In addition, as appears from Ex- [fol. 76] hibits C and D hereto annexed, there are holes under the said fence which evidently have been dug by children for the purposes of ingress and egress." Do you recall making that statement in that affidavit?

A. I do.

Q. I ask you, sir, at this time, bearing in mind your previous testimony a couple of questions ago that you had no knowledge of how the holes were dug, on what did you base the statement in this affidavit that the holes evidently were dug by children?

A. By my experience.

Q. Did you ever hear of erosion by water pressure?

A. I do.

Q. Mr. Ott, if a stream of water were to flow continuously or during rainstorms at one spot under a fence, would you not cause a depression or hole because of the type of earth there?

A. Definitely not like this.

Q. Mr. Ott, is not just as plausible that an adult, as opposed to a child, could have dug that hole?

A. Did you say plausible?

Q. Yes.

A. Very improbable.

Q. But it is possible, is it not?

A. Possible, yes.

Q. Actually, you had no idea who dug it or how it was dug?

A. I answered that.

Q. That was merely your opinion, is that correct?

A. That is right.

Q. If you would, sir, refer again to Section "E" of your cross sections, sheet No. 6 of twelve sheets in Exhibit 4 in evidence, reading at the upper left-hand corner, as we said before, you would show a 10-foot distance from the fence to the commencement of the excavation, is that correct?

A. That is right.

[fol. 77] Q. And then the solid line is existing ground as shown by you?

A. That is right.

Q. Is it not a fact, sir, that the 2 on 1 maximum slope which you shown on a dotted line is a more severe cutting away than the existing ground at that cross section?

A. Yes.

Q. If the 2 on 1 slope were maintained, which you say is the requirement of the present ordinance, what would the width of the berm then be from the fence to the commencement of a 2 on 1 slope?

A. May I have that question read?

(The last question was read.)

A. I will answer you, as I think you intend the question. The 2 on 1 slope on Section "E" is plotted beginning at the 20-foot minimum from the fence. If the 2 on 1 slope were moved parallel to itself and began at the actual top of the bank which is 10 feet away, it would still have the same slope.

Q. What I was getting at is this, sir. Maybe I can ask you a question pointing to this a little better. According to your exhibit, it appears to me, and I want you to tell me whether I am right or wrong, that what you say is the permissible angle to cut is far sharper than the existing ground.

A. Oh, it is.

Q. Therefore, it would seem to me that you could take an awful lot of earth out of here and deposit a small amount in here to make this a 20-foot berm and then maintain the 2 on 1 slope?

A. That could be done on that particular section (referring to Section "E" on Plaintiff's Exhibit 4).

[fol. 78] Q. I show you, sir, Defendant's Exhibit E for Identification at an examination before trial of June 5, 1959, and ask you if you have ever seen this document before.

A. I have never seen this before.

Q. When you commenced your survey of the sand pit which is the topographical map up on the bulletin board, which is Plaintiff's Exhibit 3, with respect to the boundary lines or what you say are the confines of the sand pit, are those correlated or based upon any examination of deed or deed records or filed documents in the County Clerk's Office so as to determine the accuracy of the filed lot? Do you follow me?

A. It is.

Q. Was that so predicated?

A. Yes, it was correlated with the deed on record.

Q. Did you check the various distances? Was it a metes and bounds description in a deed that you checked against?

A. As I remember, it was.

Q. Then you checked, in other words, the angles as shown in the metes and bounds as well as the lineal feet shown on each course and distance?

A. Yes.

Q. I realize there are many, because it is irregular.

A. Yes.

Q. And the fence that you found surrounding the property, sir, is that fence on or about on the property line?

A. It is both, on or about the property line.

Q. I mean with possible variations, but for the sake of general discussion we would say it is on the line?

A. Yes, sir.

Q. I believe yesterday, sir, you said, when I asked you how many lineal feet there would be around the perimeter, [fol. 79] that is if you counted the number of feet of fence, you said about a mile?

A. Yes.

Q. Which would be 5,280 feet?

A. Yes.

Q. I ran a rough check of the distances and I came out with over 7,000 feet. Would you say it is possible it is over 7,000 feet?

A. Definitely.

Q. In 7,000 lineal feet you found only those two holes, is that correct?

A. Yes.

Q. In connection with the preparation of Plaintiff's Exhibit 3, did you make any computations as to the amount of cubic yardage of material which has already been removed from the sand pit?

A. Yes.

Q. Do you follow me, sir?

A. Yes.

Q. I am asking you first what has already been taken out, not the figure you would have to put back in. That will be my next question. I do not want you to be confused by the two questions. The question now on the record is—

A. As to all the material—

Q. Did you compute what was taken out?

A. No, except we roughed it out, because we can never compute what has been taken out without having a knowledge on a survey of the surface that existed before the start of the pit.

Q. Right. Did you know how long this pit was in operation?

A. Not definitely.

Q. Did you compute the amount of cubic yardage that would be required to bring that excavation back up nearer to level with nearest established grade, or any amount with relation to the established grade of the nearest abutting street?

A. That was, again, a rough computation.

Q. What was your computation on it?

A. Somewheres in excess of a million yards.

[fol. 80] Q. Did you make any computation of how many cubic yards remain in the sand pit to be mined therefrom?

A. We did not.

Q. The figure of some one million yards, sir, would that be a compacted figure?

A. I said it was roughed out.

Q. I believe in an affidavit in this case you have used the figure of 888,000 cubic yards?

A. I did, and that is a specific computation to a certain level which you have not asked in your questions.

Q. I ask you, sir, this question: In order to raise the bottom of the pit so as to bring it to a level of 2 feet above maximum ground water, did you compute the amount of cubic yards that would be required?

A. We did.

Q. And what was that figure, sir?

A. 880,000 cubic yards.

Q. Would that be a compacted figure?

A. That would be a compacted figure.

Q. In other words, you would have to bring in in excess of that figure and then it would settle down to that?

A. That is correct.

Q. That would be compacted or pressed down?

A. Yes.

Q. Has your firm billed for the services rendered in connection with this survey and map?

A. I don't know.

Q. Do you know, sir, to whom that bill will be rendered or was rendered, if it has already gone out?

A. I believe it will be to Nassau County.

The Court: Do you know?

The Witness: I do not. That is administration.

[fol. 81] Q. Mr. Ott, do you recall being examined before trial on June 6, 1959 by me in this building?

A. I do.

Q. I am reading now from page 28 of your examination, starting at line 22. Do you recall my asking this question:

"Question: Have you already billed or are you going to bill for your services at the sand pit?

"Answer: We are."

Do you recall that question and making that answer?

A. I do.

Q. Do you recall this question:

"Question: Now, to whom will that bill be rendered?
"Answer: To Mr. Clarence Southard, Deputy Commissioner of the Department of Public Works."

Do you recall that question and answer?
A. I do.

Q. "Question: To the County of Nassau?
"Answer: That's right."

Do you recall that question and answer?
A. I do.
Q. Does that refresh your recollection as to where your bill would go, sir?
A. Until the bill is sent, the answer to that question is correct, but until the bill is sent, I presume it is going to Nassau County.
Q. Is that because you know you were hired by Nassau County?
A. I would say that would be the inference.

[fol. 82] Mr. Miller: In connection with a line of questioning at this point, if your Honor please, I would like to offer in evidence the transcript of the stenographic minutes of a trial, Special Term, Part I, Nassau County, between the Town of Hempstead and East Meadow Realty Corp. and Builders Sand & Gravel Corp., the defendants. The trial was February 14 and 15, 1956. This is the trial before Mr. Justice Hill.
The Court: No, Mr. Miller, that is not a proper part of the plaintiff's direct case. When your turn comes, then we will decide whether that is allowable or not.
Mr. Miller: The only reason I offered it at this time, Judge, is that I was going to ask this man certain questions and the transcript has several references to activities and size of the pit in 1927.
The Court: You try to use it without getting the whole thing in evidence and see what happens.
Mr. Miller: All right.

Q. Now I believe you testified before, Mr. Ott, if I am correct, that you had no personal knowledge as to the time when this excavation commenced.
A. That is right.

Q. I would like, sir, to read you four or five lines from a transcript of the stenographic minutes of a trial and then ask you some questions in connection with the present physical surroundings of the pit.

The Court: Is it his testimony?

[fol. 83] Mr. Miller: No, it is not his testimony, Judge. This is to orient him in 1927.

The Court: I am afraid, if there is an objection, I am going to have to sustain it.

Mr. Charles: There is, sir.

Mr. Miller: Let me put the question this way:

Q. Mr. Ott, assuming that in 1927 there was a sand pit in East Meadow, Town of Hempstead, Nassau County, and assuming that there was an excavation which was 30 feet deep, there was a lake—

Mr. Charles: Does it say that?

Mr. Miller: Does it say what?

Mr. Charles: Does it say it was a lake?

Mr. Miller: Do you want to read it?

Mr. Charles: I am reading it with you and I cannot see l-a-k-e.

Mr. Miller: "Was there a l-a-k-e created?"

"Answer: Yes, there was water."

The Court: It is 1 o'clock, gentlemen.

Mr. Charles: It was not in that sentence.

Mr. Miller: I am reading four lines, Mr. Charles.

The Court: We shall recess for lunch at this time, gentlemen. Be back at 2 o'clock.

(A luncheon recess was taken.)

[fol. 84]

AFTERNOON SESSION

FREDERICK C. OTT resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Mr. Miller: Just for the record, I will withdraw the last question on the record before the colloquy between counsel.

Cross examination.

By Mr. Miller (continued):

Q. Mr. Ott, if you would, please, assume that in 1927 at the subject property which you have surveyed there was an excavation of some 400 feet in width by 30 feet deep, and the 30 feet deep means below water; that there was a lake created of 30 feet in depth; I ask you, sir, based upon your experience as a licensed surveyor and based upon your knowledge of the subject property, under such assumption would the excavation have been more than 10 feet below the established grade of the nearest abutting street? Do you follow me, sir? An excavation, 30 feet of water at that subject property, would that be more than 10 feet below established grade?

A. It is most difficult to base an answer upon the assumptions you have given me.

Q. Is it not correct, sir, that you have plotted on Plaintiff's Exhibit 3 in evidence the grade? Do you show the grade on that topographical survey?

A. Of the adjacent streets, yes.

Q. Let us take Newbridge Avenue, the main entrance to the pit. What is the established grade of Newbridge Avenue?

A. It is shown on the survey there.

[fol. 85] Q. Would you point that out to his Honor, please, and tell me what the figure is?

A. Yes. At the southerly end of the pit on Newbridge Avenue, 57.6.

Q. Opposite the gate, the entrance by the office?

A. Opposite the gate would be approximately 60 feet elevation.

Q. I see a figure of 59.7, is that not correct?

A. Yes.

Q. Now I ask you, sir, if in the excavation itself there had been created a lake 30 feet in depth in 1927, would that not have been in excess of 10 feet below the established grade of Newbridge Avenue, sir?

A. At that point?

Q. Yes.

A. At the gate?

Q. As a point of reference, let us take the 59.7 elevation opposite the gate, and if you walked into the gate in 1927, to make a survey, and you saw an excavation with a lake which was 30 feet deep, the water 30 feet deep, I ask you, assuming this hypothesis, if you had gone in under those circumstances, would the depth of the pit, the 30 foot deep lake, have been more than 10 feet below the established grade of 59.7 on Newbridge Avenue.

A. I will answer that yes, 30 foot deep.

Q. Sir, would it not be correct that under the same assumption the excavation would have been below 2 feet above maximum ground water level at that site?

Mr. Charles: I object to this on the ground that it is immaterial to the present lawsuit.

Mr. Miller: If I may be heard, Judge, I think it is highly material in view of the defenses pleaded.

[fol. 86] The Court: Is that your only ground, immateriality?

Mr. Charles: Irrelevant and incompetent.

The Court: Why is it incompetent?

Mr. Charles: It is incompetent because we are suing under a statute which was passed in 1945 originally, and that is the basis of our lawsuit, and that conditions that existed in 1927 could only go to use. In other words, the defense of res judicata is based on an action brought under a zoning statute. The action that is now being brought is brought under a regulatory statute from which flows the police power of the Town, and therefore what the conditions were in 1927 are immaterial and irrelevant and certainly incompetent under those conditions.

Mr. Miller: If I may be heard, Judge—

The Court: You may.

Mr. Miller: I believe under the defenses we are pleading we have not only pleaded res judicata under the zoning ordinance, which is the building zone ordinance of 1930—which has already been adjudicated before Judge Hill—but we are also claiming here that we have a valid, vested nonconforming use with respect to the provisions of the 1945 ordinance under which this complaint is based.

In other words, this is highly material at this point for this reason: If in 1927 we were 30 feet deep, which the minutes indicate in the previous trial, if that is more than 10 feet below grade and if that is below 2 feet above max- [fol. 87] imum ground water level, as those two phrases are used in the 1945 ordinance, then when they passed an ordinance in 1945 with regulatory provisions, we merely did not conform to that ordinance, and that ordinance cannot be asserted against us in this case. We have a valid nonconforming use as against the later adopted ordinance.

The Court: I sustain the objection, first upon the grounds given by Mr. Charles, secondly that it is not proper cross-examination, and thirdly, no proper foundation has been laid for the question.

Mr. Miller: I respectfully except.

Q. Mr. Ott, when you surveyed this property in 1959, at what elevation would you say there was maximum ground water level at this site?

A. At elevation 50.2.

Q. What would the elevation be in that excavation at a depth of 30 feet of water?

A. 20.2.

Q. At an elevation of 20.2, sir, is it not a fact that you would be below 2 feet above maximum ground water level? 2 feet above maximum ground water level would be what, 2 on top of 50.2?

A. Yes.

Q. So, 52.2 would be 2 feet above maximum ground water level?

A. Yes.

Q. And you say that with a 30 foot deep lake you would have an elevation of 20.2?

A. That is right.

Q. Mr. Ott, is it not a fact that your firm has been employed by the municipal unit, either Town of Hempstead or County of Nassau, having jurisdiction over Newbridge [fol. 88] Avenue with respect to plans to widen Newbridge Avenue adjacent to this sand pit?

Mr. Charles: I object to that on the ground it is improper cross-examination.

The Court: Is this addressed to his credibility as a witness?

Mr. Miller: No, it is addressed to several grounds: One, credibility; two, Judge, on the question of the plans for the improvement of Newbridge Avenue and what they expect to do with the storm water which they will have to drain off of it in order to improve it. We are going to show by maps that they already have plans to drain into our sand pit, and that is part of our defense in this case.

The Court: Then do it at the time of your defense. Objection sustained. You see, Mr. Miller, I have to keep my eye on the issues in this case.

Mr. Miller: Then I will recall Mr. Ott as my own witness.

Q. Mr. Ott, this morning you mentioned that you had roughed out or roughed an estimate—pardon me if I do not have the exact word—of the amount of cubic yards that had already been removed from there. You said you could not determine it precisely because you did not know, obviously, what the terrain was when the excavation commenced. Do you recall that answer, that you had made a rough calculation or rough estimate?

A. I do.

Q. Could you tell me, sir—I neglected to ask you at that time—what was your rough calculation or estimate as to [fol. 89] the number of cubic yards which have been already removed, subject, as you mentioned on your own testimony, to not knowing the exact terrain?

A. I said well over a million yards.

Mr. Miller: I have no further questions of this witness, with the understanding he will remain subject to subpoena, which has been agreed upon.

The Court: Is that agreeable?

Mr. Miller: He has been subpoenaed as a defense witness. He was also called as a witness for the plaintiff. I will defer any further questions until such time as I call him as my own witness on the defense.

Mr. Charles: We will hold him available.

No redirect.

(The witness was excused.)

Mr. Charles: With that, your Honor, the plaintiff rests.

The Court: Plaintiff rests.

Mr. Miller: If your Honor please, at this time the defendant moves to dismiss the first and second causes of action of the complaint on the ground that the plaintiff has failed to make out a prima facie case under the terms of the ordinance—if I may, Judge—will you strike that out?—the defendant at this time will reserve all motions until the end of the case.

The Court: Are you ready now to present your defense?

Mr. Miller: I am ready. I will call Mr. Ott as my first witness.

[fol. 90] Frederick C. Ott, recalled as a witness by the defendants, resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Direct examination.

By Mr. Miller:

Q. Mr. Ott, you are employed by Lockwood, Kessler & Bartlett, are you not?

A. I am.

Q. Is it a fact, sir, that Lockwood, Kessler & Bartlett has been retained in connection with the plans to improve Newbridge Avenue at or near and adjacent to the sand pit which is the subject matter of this proceeding?

Mr. Charles: Prior to making my objections, your Honor, I would like to know now specifically under which defense the defendant is offering proof.

Mr. Miller: The present questions, if your Honor please, are primarily in connection with the third separate defense pleaded in the answer.

The Court: Which briefly is what?

Mr. Miller: Which briefly is that the plaintiff for many years has indicated a need to acquire the real property in this complaint for drainage, and my questions of

this witness are with respect to drainage of Newbridge Avenue which is adjacent to the sand pit.

Mr. Charles: My answer to that is, your Honor, that the evidence sought to be obtained from this witness is irrelevant, it is immaterial, and it is incompetent, because [fol. 91] motive is no part of this lawsuit and the courts have so held.

The Court: I have your brief here.

(Discussion off the record.)

The Court: Your contentions are solely that the cause of action is one in violation of the Town ordinance, is that correct?

Mr. Charles: That is correct, sir.

The Court: Objection sustained.

Mr. Miller: If your Honor please, at this point I must confess for the record that I have not been extended the courtesy of being served a copy of that memorandum to which you made reference and therefore I am not in any position to argue on the point of evidence.

The Court: Are you in a position to sustain your affirmative defense?

Mr. Miller: I am in a position to sustain my affirmative defense, if your Honor will take the proof which I am going to adduce.

The Court: What law have you to sustain you on your affirmative defense?

Mr. Miller: There is a general proposition in equity that a plaintiff in an equitable action must appear with clean hands. Motive is an essential element of the doctrine of clean hands. If this action is not brought in good faith, if the actual intention of the plaintiff in this action is an attempt to harass and annoy the defendants with a view in mind of knocking down the price which might have to be paid in a condemnation proceeding which is now imminent, then and in that event the courts—if upon all the evidence [fol. 92] adduced it is believed that the proper motive is indirect that there is not an actual bona fide enforcement of the ordinance—the courts may sustain the defenses and find affirmatively for the defendant in such a case. If it is

proven upon the trial, on the other hand—and I must concede this—that they in good faith have always enforced their ordinances, and meticulously come in and enforced their ordinance in this case, if we are in violation and do not have a saving by virtue of a nonconforming use, then and in that event we would be guilty or in violation of the terms of the ordinance. But until the proof is brought in before your Honor, I frankly must confess that I do not see how your Honor can rule on the question of the good faith of the Town in bringing this action.

The Court: You have no law to sustain your position.

Mr. Miller: As I told your Honor, I was directed to appear for trial within a two-week period of time, roughly speaking, and I could not do it.

The Court: That is not exactly true, sir.

Mr. Miller: I believe it was the closing days of May when we were in chambers with your Honor, and the trial was set for June 15.

The Court: But before that you were before Mr. Justice Munder and he directed an early trial, and all you came before me on was the question as to whether the case should be tried June 1, as Mr. Justice Munder directed you, or [fol. 93] tried in the latter part of June. At that time I told you that it could not be started on June 22 or 23 because that would be the last week of the June term. I therefore directed both of you to speed up your examination before trial and to be ready for trial on the 15th.

During the time this case came on, during the period between which the case came on before Mr. Justice Munder and the case came up for trial, which was the 16th of June, yesterday, a whole month elapsed, and during that time you had sufficient time to find law to sustain your position in this case.

Mr. Miller: Judge, in that period of time I conducted eleven separate examinations before trial in this case and there was other preparation, maps and photographs and many other things which had to be done.

The Court: Counselor, the most fundamental thing in the preparation of a case, in my opinion, is finding out what the law is going to be to sustain your position first, and then you build up the facts.

Mr. Miller: Judge, I agree with you that the law is highly material, but I respectfully submit that the best memorandum of law with no evidence to put in as your direct case or as your direct defense will not serve to aid you.

Your Honor has sustained the objection?

The Court: I have sustained the objection.

Mr. Miller: I respectfully except.

[fol. 94] The Court: Of course.

Q. Mr. Ott, I believe you testified you were a licensed surveyor, are you not?

A. I am.

Q. Would I be correct in assuming that you can read a map, sir?

A. I can.

Mr. Miller: I ask that this document be marked as Defendant's Exhibit C for identification.

(Marked Defendants' Exhibit C for Identification.)

Q. Mr. Ott, I show you Defendants' Exhibit C for Identification and I ask you, sir, if you know what this document is.

COLLOQUY

Mr. Charles: I object to that, your Honor, upon the grounds that if it is being offered as part of the third separate defense, then it is incompetent, irrelevant and immaterial.

The Court: He has not said for what defense he is offering it yet.

Mr. Charles: Will you tell us as to what defense you are offering it?

Mr. Miller: Judge, I do not see how it is (sic)

(sic) Mr. Miller: Judge, in that period of time every single exhibit with every defense, I had better keep the pleadings with me.

The Court: That will not be necessary, but I have not the slightest idea what this map is all about, you see. It may not be on the affirmative defenses, for all I know.

Mr. Charles: I do not know.

The Court: It may be part of his answer to you without being an affirmative defense.

[fol. 95] Mr. Charles: That is right.

Mr. Miller: Judge, it is difficult to pick out as to what portion of the defense a specific exhibit—

The Court: What is the map?

Mr. Miller: The map is a comprehensive master plan of drainage for the upper Newbridge Avenue which includes the subject property.

The Court: And once the map gets into evidence, then what is the relevancy and materiality of the map to me who have to decide the case?

Mr. Miller: The map shows, your Honor, the points at which they plan to drain the adjacent streets and area into our pit, and if that is not material, I confess I do not know what is.

The Court: Is it in answer to their affirmative case?

Mr. Miller: It is on everything, it is affirmative defenses and the general denials. It is the question of good faith, it is the question of drainage, it is the question of acquisition, it is the question of denials to the complaint.

The Court: They claim in the first cause of action—by "they" I mean the Town of Hempstead—that you have not complied with Ordinance No. 16, is that correct? Is that the gist of action number one?

Mr. Miller: Yes.

The Cou. : The first cause of action is that you have not complied with Ordinance No. 16, in that the defendant [fol. 96] failed to obtain a permit or procure a permit. That is the gist of cause number one?

Mr. Miller: Yes, sir.

The Court: The gist of cause number two is that the property itself is actually in violation of Ordinance No. 16. Is that the gist of action number two?

Mr. Charles: Yes, your Honor.

The Court: How is this map relevant on cause number one and cause number two?

Mr. Miller: It is not relevant to cause number one of the complaint.

The Court: It is not relevant to cause number one.

Mr. Miller: It is not relevant on the question of a permit.

The Court: How is it relevant on cause number two?

Mr. Miller: With respect to the second cause of action in the complaint, if your Honor please, the complaint specifies various points of reference in this subject property from the property lines and from the established grade of the nearest public street. The nearest public street is depicted upon this map. Also, there is a condition alleged of failure to refill the pit excavation where earth has already been removed to the maximum extent allowed under the ordinance with the conclusion that there is no adequate remedy at law. Actually, plaintiff has an adequate remedy to not only remedy the alleged violations here, which we submit are not violations, but the remedy to cure the entire situation by condemnation and acquisi-[fol. 97] tion of this property, for which they have already drawn up maps—

The Court: Suppose I do this. Suppose I take it and you gentlemen can argue in your briefs its relevancy.

Mr. Miller: With respect to the defenses pleaded in the answer—

Mr. Charles: Then I have a general exception to any evidence that is being offered to sustain the third separate defense.

The Court: No, I will not give you a general exception, Mr. Charles. What I want you to do, each time you make your objection and then I shall rule. If I rule in such a way as to make it allowable, I will say so; at other times I may rule and say I will take it and ask you to brief the question.

Mr. Charles: Very well, sir.

The Court: That is what I am doing now. In respect to this map, I am taking it and then you brief the question later on as to whether it is admissible or not. Because at this point I am being asked to become an expert in this field, you might say, on a few moments' notice.

Mr. Miller: May I just state, if your Honor pleases, that aside from the arguments I advanced with respect to the complaint, the defense deems it highly material with respect to the defenses pleaded, particularly the third separate defense, as to the relevancy and admissibility of

this map. The third defense is that they have indicated a need for and a desire to acquire the real property in [fol. 98] order to correct drainage conditions. This map actually shows the points at which they will drain into this sand pit.

The Court: On the third defense I am going to rule right now that you are not going to show motive.

Mr. Miller: Without going into the definition of the word "motive," if your Honor please, I think a course of conduct actually entered into by the plaintiff in this action is highly material to this case. Motive presupposes a mental attitude along with conduct. I would respectfully submit that the course of conduct would definitely be admissible, as to what they have affirmatively done, not, what I am trying to say, what they are thinking of doing. Motive may imply a mental attitude as well as a physical act, but certainly the physical acts which they have done and the maps which they have already drawn would be admissible with respect to an alleged defense.

The Court: Is this on number three, the third affirmative defense?

Mr. Miller: It is directly material with respect to number three.

The Court: If it is on number three, it is excluded.

Mr. Miller: I respectfully except to your Honor's ruling. Does your Honor likewise rule the same way with respect to the second separate defense pleaded in the answer, in that the application of what the plaintiff has done in the preparation of these instruments and the course of conduct would operate to deprive the defendant of the lawful [fol. 99] use of his property without due process of law?

The Court: What is your second defense?

Mr. Miller: That the ordinance is unconstitutional, illegal, invalid, discriminatory, confiscatory and void, inasmuch as same is deemed to affect the premises of defendant Goldblatt, in that this court has previously adjudicated a nonconforming use of the premises for the business conducted. Said ordinance further is void on the ground it constitutes ex post facto legislation and contravenes the provisions of the United States Constitution and the Con-

stitution of the State of New York—and here is the material reference with respect to this course of conduct—that said ordinance further is void on the ground that its application would deprive the defendant Goldblatt of the lawful use of his property without due process of law; and further that application thereof to the said premises so permanently restricts the beneficial use thereof as to amount to confiscation of property rights without just compensation, which would come well within the purview of the Fifth and Fourteenth Amendments of the Constitution.

The Court: Is that the only law you have to sustain your point, the due-process clause of the Fifth Amendment?

Mr. Miller: Arverne Bay Construction Company against —I am picking it out from memory—

The Court: 278 New York.

[fol. 100] Mr. Miller: 278 New York. Pennsylvania Coal Company v. Mahon, U. S. Supreme Court.

The Court: Those are just general cases, are they not?

Mr. Miller: With respect to this point, if your Honor please, the constitutional point.

This is a map prepared by an employee of the plaintiff Town of Hempstead.

The Court: We will take the map in evidence.

Mr. Charles: Exception.

The Court: On the condition that I told you. You can argue the relevancy later on. I do not want to foreclose counsel from proving these vague defenses. If it is immaterial, you can argue in your brief and I will not consider it then. Why argue the point now?

Mr. Charles: All right.

The Court: There is no jury here, I am not going to decide it now, you will brief the point.

(Received in evidence as Defendants' Exhibit C.)

The Court: Are you going to offer any proof to counteract the affirmative case made by the plaintiff on counts one and two?

Mr. Miller: I am going to offer direct testimony as to the fact that they are nonconforming.

The Court: Would you not be better off—you are the attorney now—if you offered evidence to counteract their [fol. 101] causes of action one and two before you worried about these affirmative defenses?

Mr. Miller: The only thing I was going into with Mr. Ott, off the record, was to save him some time so he would not have to return.

The Court: Never mind saving him some time. You try to help the Court to understand this case.

Mr. Miller: Yes, I could go into direct question of non-conforming.

The Court: Why don't you do that?

Mr. Miller: I will be glad to if your Honor would prefer it that way.

The Court: In your good. It is better if you defend on the issues they have raised than to worry about these affirmative defenses at this particular point.

Mr. Miller: Surely. If your Honor please, in view of our discussion, at this point then I would ask leave of the Court to excuse this witness and I would call another witness to the stand and proceed with another line of examination, subject to his recall.

The Court: All right. Mr. Ott may object to a certain extent, but in the interests of justice he will come back if necessary.

(The witness was excused.)

[fol. 102] HERBERT W. GOLDBLATT, residing at 127 Stevens Avenue, Hempstead, New York, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Goldblatt, what is your occupation?

A. I am in the sand and gravel business.

Q. How long have you been engaged in the sand and gravel business?

A. Personally, I would say about twenty years.

Q. Would you tell his Honor briefly what do you mean by the sand and gravel business?

A. Mining sand and gravel at the sand pit in East Meadow.

Q. Aside from the mining of the raw aggregates out of the earth, are there any other procedures that you do at your pit?

A. We wash it and screen it and process it into different grades of material, and naturally we sell it.

Q. In point of time, how far back do you have personal knowledge of this property?

A. I can remember back to when I was a child, I mean visiting the property with my parents.

Q. Do you have any independent personal recollection of this property at the time it was first developed as a sand pit?

A. Yes, I do.

Q. When was that?

A. That was in 1927.

Q. Had you ever seen the property before the sand and gravel business started?

A. No, my earliest recollection was about the time when it first started, it was just beginning at that time.

Q. At that time in the beginning it was originally flat land?

A. Yes, substantially.

Q. Then an excavation was commenced, is that correct?

A. That's right.

[fol. 103] Q. By what means was that excavation?

A. It was originally started with a drag line, and when they got down to water they built a dredge, and from that point on it was a dredging operation. That was over a period of about a year, I would say.

Q. When would you say the first dredging operation commenced in point of time?

A. Somewheres around 1928.

The Court: 1928?

The Witness: '28 or '29.

Q. Was there water on the property before the dredge was actually put in?

A. Well, they had to have water in order to float a dredge, yes. There was water put forth.

Q. You have been personally engaged in this business for some twenty years?

A. Directly, yes.

Q. Twenty years ago would be 1939, is that correct?

A. Right.

Q. In 1939, sir, do you have personal recollection of the size of the excavation?

A. At that time the lake was rather large already, yes, quite large.

Q. Prior to 1945, at your sand pit in East Meadow, did you have any excavations commencing within 20 feet from the property line?

A. Yes.

Q. Do you know approximately how many points prior to 1945 you may have been less than 20 feet from the line?

A. I would say there were at least half a dozen places like that.

Q. The perimeter of the pit is not static, it is not constant, is that correct?

[fol. 104] Mr. Charles: If your Honor pleases, I object to this line of testimony on the ground that it is irrelevant to the present condition that has been testified to by Mr. Ott, and I do not see the purpose of the proof.

The Court: I will allow it.

Mr. Charles: Exception.

(The last question was read.)

A. It depends on the location. If it is an area which you are mining in, it would not remain static. If it was an area which you were no longer mining in, it would naturally remain static.

Q. Prior to 1945, particularly December 18, 1945, was the incline of the side walls of the pit greater than 2 horizontal feet to 1 vertical foot?

A. That is definite.

Mr. Charles: I have the same objection.

The Court: Same ruling.

Mr. Charles: Exception.

Q. What was your answer, sir?

A. Definitely.

Q. Do you know in how many places the angle was greater than 2 on 1?

A. I would say at practically all points where the ground had been excavated.

Q. Do you know, sir, of your own knowledge what the approximate angle of the side walls was prior to 1945?

A. Approximately 45, perhaps slightly gentler than that.

Q. Would you tell the Court, please, a 2 on 1 or 2 horizontal on 1 vertical is what angle?

A. That would represent a declining angle of 30 degrees.

[fol. 105] Q. You said you had about a 45 degree angle prior to 1945, is that correct?

A. That is right, and that would be equivalent to a 1 foot on 1 foot.

Q. 1 on 1 is 45 degrees, 2 on 1 is 30 degrees?

A. That is right.

Mr. Miller: If your Honor please, pursuant to stipulation with Mr. Charles, we will add to the notice to admit an ordinance requiring the safeguarding of open sand banks, pits and quarries, dated October 30, 1934.

Mr. Charles: That is all right.

Mr. Miller: That is the notice to admit, it is part of the record.

Q. Mr. Goldblatt, with respect to your property and the perimeter lines, is your property fully enclosed with a fence?

A. It is.

Q. What type of fence is that, sir?

A. It is a six-foot high chain-link fence with three strands of barbed wire on top.

Q. Does that fully enclose your property except for gates for access and egress?

A. That is right.

Q. Do you know, sir, of your own knowledge, when that fence was erected?

A. About 1949.

Q. Prior to 1949 were the premises open or was another fence up there?

A. No, it was enclosed with what is known as farm fencing which is a square pattern of wire with a mesh, I would say, of approximately six inches.

Q. When the chain-link fence was erected in 1949, to your knowledge was the construction of that fence inspected by the Building Department of the Town of Hempstead?

[fol. 106] Mr. Charles: I object to that on the ground it is incompetent on this trial.

The Court: What year was this?

Mr. Miller: 1949.

The Court: I will allow it.

Mr. Charles: Exception.

A. Yes, it was inspected by Mr. Young of the Building Department.

Q. You personally saw him on the premises?

A. Oh, yes.

Mr. Miller: At this point, if your Honor please, I ask the Court to take judicial notice of the provisions of the ordinance of 1934 which we have just added to the notice to admit, which said ordinance requires a fence six foot in height of steel wire mesh, without any requirement for a concrete curb. This is all addressed to the—

The Court: That is in 1934?

Mr. Miller: 1934. My argument now is addressed only to the concrete curb under the fence which is a portion of the complaint.

The Court: I am permitted to take judicial notice of any ordinance, past and present, I presume, under 344a of the Civil Practice Act.

Mr. Miller: I am asking these questions, if your Honor please, because I am about to make a motion to dismiss that one portion of the complaint.

The Court: I am taking judicial notice of the 1934 ordinance.

[fol. 107] Mr. Miller: Right. I further ask your Honor to take judicial notice of the ordinance of December 18, 1945, which is the ordinance on which this complaint is based as amended, and the original ordinance in 1945 contained no

provision for a concrete curb under the fence. The ordinance of November 25, 1958—1958—adds a requirement of a concrete fence and you have testimony before your Honor that this fence was erected in 1949, nine years before they adopted a provision that a curb must exist under the fence. I therefore at this time move to dismiss that portion of the second cause of action with respect to the failure to have a concrete curb underneath the fence.

The Court: I will reserve my decision on your motion.

Mr. Miller: Thank you.

The Court: I would like to point out, the mere fact that I take judicial notice of the ordinance at this moment does not mean it is in my human head here. One of these days I will have to read that ordinance to which you have reference.

Mr. Miller: I presume that your Honor will read the ordinances.

The Court: I am giving you the reason why I am not ruling right now.

Mr. Miller: I see what you mean, of course.

The Court: I would like a little bit more orderly procedure in this trial.

Mr. Miller: What is that, sir?

[fol. 108] The Court: I would like a little bit more orderly procedure in this trial, in other words, more orderly steps.

Mr. Miller: I am following the complaint verbatim, if your Honor please, which I thought was what your Honor had in mind.

The Court: Go ahead, develop your evidence.

Q. Mr. Goldblatt, in the course of your business do you inspect the fence which surrounds the perimeter of your property?

A. Yes, we do.

Q. How often do you make inspections?

A. About twice a week.

Q. When was the last time you made an inspection of your fence?

A. There was an inspection made toward the early part of last week.

Q. Did you personally make that inspection?

A. Yes, I did.

Q. Did you find any openings in the fence except for the gates necessary for access and egress?

A. No other openings.

Q. Do you supervise or personally make inspections periodically to see that there are no openings except for access and egress?

A. I supervise them and sometimes I make the inspection myself, yes.

Q. Mr. Goldblatt, do you know what the maximum ground water level is at the site of your pit?

A. You want it in an elevation referring to Nassau County datum?

Q. Yes, if you know.

A. At present it is approximately elevation 50.

Q. You heard the testimony of the plaintiff's witnesses here, did you not, that your excavation is below 2 feet above maximum ground water level? Did you not?

A. Yes.

[fol. 109] Q. I would ask you, sir, when in point of time, to your knowledge, there first existed an excavation less than 2 feet above maximum ground water level?

Mr. Charles: I object on the ground it is immaterial to the present action.

The Court: I will allow it.

Mr. Charles: Exception.

A. My answer to that is prior to 1930.

Q. Do you know the grade of Newbridge Avenue adjacent to your sand pit?

A. I would have to refer to a map.

Q. Adjacent to you, Mr. Goldblatt, is Plaintiff's Exhibit 3 in evidence, which is a topographical survey of your pit. By examination of that exhibit are you able to tell the Court what the elevation is of Newbridge Avenue adjacent to your pit?

A. Yes.

Q. What is that, sir?

A. Opposite the main gate, 59.7.

Q. Is your excavation more than 10 feet below the established grade of Newbridge Avenue?

A. It is.

Q. When in point of time, for the first time, was your excavation more than 10 feet below the established grade of the nearest public street?

A. Prior to 1930.

Q. Are you today presently actively mining sand and gravel at the premises?

A. Yes, sir.

Q. Have you exhausted that pit in any portions?

Mr. Charles: I object to that.

The Court: Which part are you objecting to?

[fol. 110] Mr. Charles: That is immaterial and irrelevant.

The Court: Which part are you objecting to? The whole question?

Mr. Charles: The "exhausted" part of it.

The Court: Objection overruled.

Mr. Charles: Exception.

A. No, we have not exhausted the available deposits.

Q. Are there any portions or parts of your pit where the earth has already been removed to the maximum extent allowed under the ordinance, the ordinance being Ordinance No. 16?

A. No, there are no such portions.

Q. Mr. Goldblatt, are there any portions of the perimeter of your property which permit public access to the pits and slopes?

A. No.

Q. Based upon your personal inspections of your fence, Mr. Goldblatt, are there any openings, gaps, or holes in your fence?

A. No, sir.

Mr. Miller: If your Honor please, in order to keep a continuity of the questions, at this point if I were to continue with this witness I would go into the questions of the affirmative defenses. I have no further questions with respect to the complaint itself, and if it is all right with your Honor, I would allow cross-examination at this point subject to my continuing later with the defenses.

The Court: You finish with this witness now.

Q. Mr. Goldblatt, would you please direct your attention back to the year 1953, and I ask you, sir, if in 1953 you [fol. 111] had any conferences with officials of the plaintiff in this action?

A. I did.

Q. Will you tell the Court how many conferences were held between you and the officials of the Town of Hempstead?

COLLOQUY

Mr. Charles: I object again, your Honor, to this on the grounds it is immaterial, incompetent, goes to motive.

The Court: I am going to sustain the objection, because I want you to know, Mr. Miller, that in a case of Linn vs. Town of Hempstead, tried in October of 1957, I ruled at that time that the motives of legislators cannot be inquired into in the trial of an action where the motives which may or may not be behind legislation are involved.

Mr. Miller: If your Honor pleases, from what your Honor has just said of the Linn case, there is nothing in the testimony which I seek to adduce here which affects legislation in any way. These men did not sit as a legislative body. These are conferences with the officials, with the presiding Supervisor of the Township, with respect to a drainage condition adjacent to our property. These are conferences concerning the possibility of buying or condemning real property. It has absolutely nothing to do with legislation at all.

The Court: If you are offering evidence on cause of action number three, I am excluding that line of testimony, because all I can see in your cause of action number three at the most is an allegation with respect to motives of the town [fol. 112] officials. Is that correct?

Mr. Miller: Aside from motive, as I said before, Judge, there is a course of conduct here.

The Court: How is a course of conduct of any legal consequence in this case?

Mr. Miller: It is of a direct legal consequence because it goes to the good faith of the plaintiff in the bringing of this proceeding, which we maintain, respectfully, is an equitable defense.

The Court: If it has to do with your affirmative defense number three, your evidence is excluded.

Mr. Miller: If I understand your Honor's statement, or may I understand it, is that tantamount to a dismissal of the third separate defense completely?

The Court: Do you want to consider it that? I would say yes.

Mr. Miller: I would like to know, sir.

The Court: I will dismiss it right now.

Mr. Miller: Do I take it, then, sir that I am now precluded from offering any evidence with respect to the course of conduct of the plaintiff, its officials, their desire to acquire the real property, the conferences that have been held in the installation of drainage in the area?

The Court: Yes, I am so ruling.

Mr. Miller: Is that under the authority of Linn vs. Town of Hempstead?

The Court: I did not say that. All I said was that under the Linn vs. Town of Hempstead case. I ruled that the court [fol. 113] could not permit inquiry into motivation which went into the creation of an ordinance. That case was a zoning ordinance that was involved, and I did not permit inquiry into the motivating factors of the town officials of the Town Board which went into the creation of this zoning ordinance, and I so ruled. We cannot inquire into the motives of the town officials in respect to what went into the ordinance. I also say to you that if the ordinance is valid, what impelled the town officials to act in this case is not in issue.

Mr. Miller: I must respectfully except to your Honor's ruling.

The Court: You have the right.

Mr. Miller: And I would most respectfully reiterate, Judge, that there is absolutely no connection here with legislation or impending legislation or the enactment of an ordinance by these town officials with respect to the evidence to be adduced by the defendants in this case.

The Court: I say this to you, Mr. Miller: If this ordinance is legal and constitutional, the ordinance itself, no matter what the town officials may have done in the past, no matter what their motivation may have been in the past,

if that ordinance is on the books, they have an obligation and a duty to enforce it.

Mr. Miller: But if your Honor please, if the town officials failed to enforce it, this ordinance which is on the books, as against everybody in the world except one person, and if following conferences with this one particular person they [fol. 114] made certain demands, I think it is highly material in an equitable cause of action where they seek equity that they must do equity, and they must come in with clean hands.

The Court: Mr. Miller, the doctrine of clean hands may be a very old doctrine in the field of equity which goes back to what we sometimes say is time immemorial—

Mr. Miller: I would say to Lord Coke, at least.

The Court: However, no action by a public official, present or past, can waive his obligation to enforce a statute or ordinance on the books.

Mr. Miller: I do not dispute that point with your Honor. The point of dispute between your Honor and myself, I respectfully submit, is the question of adducing evidence concerning conversations between officials of the plaintiff in this action and the defendant in this action, which I respectfully submit—

The Court: Assuming everything you say to be true, assuming arguendo, as some judges would say, and I seldom do, that everything you say is so, that their motives may have been not the best, assume that they may have done everything which you say in your affirmative defense number three, that still does not change their legal obligation to enforce the ordinance which is now on the books if that ordinance is legal and constitutional.

Mr. Miller: And if it may be applied to the defendants.

[fol. 115] The Court: If the ordinance is legal and valid and constitutional, they are obligated to enforce it.

Mr. Miller: If your Honor please, I respectfully submit that aside from the third separate defense on the question of motive or course of conduct, whichever way it is termed, we still have a defense here that we are nonconforming with respect to the provisions of this Ordinance No. 16.

The Court: I will say this again to you too: Even a course of conduct on the part of town officials does not wipe

out the obligation to enforce a legal, valid, constitutional ordinance. Actions by town officials cannot waive their obligations. What they may do as individuals, even as town officials, cannot waive their legal obligation to enforce an ordinance.

Mr. Miller: I agree with your Honor that a person charged with enforcement of a legal, subsisting, valid law has an absolute duty to pursue the enforcement of that law. There is absolutely no question in my mind about that. I respectfully submit to the Court that in connection with all of the defenses pleaded in the answer, even though a course of conduct or motive may not be an absolute defense against an enforcement of a provision of the ordinance, the course of conduct or motive, whichever way it is termed, is surely a matter to be considered in general equity jurisdiction, and that where we have had direct conferences between officials in their official capacity and the defendants personally, such [fol. 116] is highly material and is legally admissible in evidence to be decided by your Honor as to the weight of the questions. Naturally, if your Honor assumes at the end of the entire proof that we did not conform to the ordinance and we do not have a legal non-conforming use as respects this ordinance No. 16, then I quite agree with your Honor that you must come to the conclusion that the ordinance then is constitutional as to us, does not become confiscatory, must be enforced, and they are charged with the duty of enforcement. Of that there is no question or quarrel in my mind.

The Court: Now let us clear our lines again. The first cause of action states that you are operating this particular pit or area without having procured or obtained a license.

Mr. Miller: That is correct.

The Court: The second cause of action is that you are operating this area or sand pit in violation of the ordinance, and then it gives the reasons why there is a violation.

Mr. Miller: Yes.

The Court: Your answer denies the allegations of cause of action number one and cause of action number two. Your first affirmative defense is that this is res judicata. Your second affirmative defense is that this ordinance is unconstitutional.

Mr. Miller: As applied to our property, yes.

The Court: Your third affirmative defense is directed [fol. 117] towards the town officials' course of conduct, as you have called it, and the town officials' motives. Have I briefly stated your third affirmative defense?

Mr. Miller: Yes, sir.

The Court: Then I say to you, your third affirmative and separate defense is invalid.

Mr. Miller: I respectfully except.

The Court: I would like to have you direct your attention to your response to the plaintiff's first two causes of action and evidence as to res judicata and evidence as to the unconstitutionality of the ordinance herein.

Mr. Miller: If your Honor please, the questions which I have last asked the witness with respect to the point of time as contrasted with the date of the ordinance, as to that I respectfully submit you have testimony before you that prior to the adoption of this ordinance he had an excavation within 20 feet from the property line, which is the first complaint. The second complaint, he is more than 10 feet below established grade, he has testified that back before 1930 he was below established grade. This is a 1945 ordinance. The next complaint is that the side walls are more than 2 on 1. 2 on 1, according to the witness, is a 30 degree angle. He says that way back before the ordinance he was at 45 degrees, which is what the former ordinance was, it is in the notice to admit, the prior ordinance said 45 but they increased their requirements, just as a 6,000 square foot lot [fol. 118] suddenly becomes a 10,000 square foot lot under a zoning ordinance, and then you come in on variances and your Honor has seen many of those Article 78 proceedings, I am sure.

The Court: Too many.

Mr. Miller: The next complaint is that there is no concrete curb underneath the fence. This fence was erected in 1949, had been inspected by the Building Department of the Township and approved by them. The ordinance later was amended to adopt the requirement of a curb. We are simply nonconforming as to the necessity of a curb.

The Court: Mr. Miller, I am giving you a lot of latitude on first affirmative defense and second affirmative defense.

But if you direct your evidence to the third affirmative defense, then I will exclude it.

Mr. Miller: I did not hear you.

The Court: I am giving you latitude on the first affirmative defense and on the second affirmative defense, and any evidence you may offer to overcome their first and second cause of action. But if you offer evidence on the third affirmative defense, it is excluded.

Mr. Miller: All right.

The Court: Anything else you want to say, Mr. Charles, to protect the record?

Mr. Charles: May I say this, your Honor: The question of the zoning statute as compared to a regulatory statute is such that prior use does not give you vested rights under a regulatory statute. The best way I can picture it is if some [fol. 119] fellow prior to 1945 in a manufacturing district discovered how to make an atom bomb and the government said to him, "Wait a second, you have got to prescribe to certain regulations that we are going to set up," and he said, "No, I had a prior use, I can blow up the whole city," that is the distinction between the cases we are talking about right at the present time.

The Court: Your position, I think, is the same position that I took in a case that I decided in Queens recently involving a hospital. I had a case in Queens involving one of the hospitals whereby, by a city ordinance, the size of the hospital rooms were required to be larger than they were at the time the hospital was built, and I held in that case that the city ordinance was valid and constitutional even though it did deprive the proprietary hospital in that case of income and also of some use of its property. And just about the time that I rendered my decision in this hospital case in Queens, the Engelsher case was affirmed by the Appellate Division, exactly the same situation being involved.

I also find in the meantime that the Engelsher case has been affirmed by the Court of Appeals.

So far as regulatory ordinances are concerned—

Mr. Charles: May I say this: and certiorari was denied on June 8 by the Supreme Court.

The Court: What I would like to do in this case, this is just a thought, is to permit Mr. Miller, within reason-
[fol. 120] able limitations, of course, to put in what he thinks is his defense under affirmative defense one and under affirmative defense two, and then I will decide the case as I discussed with you previously on the basis of your briefs, and you can point out in your briefs then why this evidence may or may not be considered by the Court under some of the decisions which you have in mind which you are going to have in mind when you look up the law, Mr. Miller.

Are we clear now? So that if I should be liberal in my admission of evidence, you are permitted to brief that question and to show me in your brief why it should not be considered by the Court.

Mr. Charles: Very well, sir.

Mr. Miller: May I just state in response to one statement that Mr. Charles made on the question of regulation and regulatory ordinances that the Court of Appeals has already held—I think it is the Arverne Bay case—that when regulation goes too far it is tantamount to confiscation.

The Court: There is no question about that.

Mr. Miller: That is the only thing I wanted on the record.

The Court: It is the old battle between police powers and proprietary rights.

Mr. Miller: If your Honor please, in view of your Honor's ruling, I must respectfully ask for permission to adjourn until tomorrow morning, because I had planned on the introduction of evidence and questions on a completely different line, and frankly it would take me quite
[fol. 121] some time to go through various documents to set myself up for a completely different line of questioning, in view of your Honor's ruling. I do not want to vex the Court and counsel in any way to try and ask questions which will be contrary to your Honor's ruling on the third defense. Your Honor has made his ruling, I have my exception. I must now, if your Honor please, correlate more or less my entire file to stay away from that third defense, and in view of your Honor's ruling, I would re-

spectfully ask for permission to conclude for this afternoon so that I may give some serious consideration to the method of introduction of further testimony.

The Court: Mr. Miller, a courteous attorney such as you, who is merely trying to protect your client's rights to the best of your ability, never vexes the Court.

Mr. Miller: Thank you, sir.

The Court: So that you are accepting over objection, of course, and with exception, my ruling in respect to affirmative defense number three.

Mr. Miller: Yes.

The Court: You are protected on the record with respect to affirmative defense number three. You are going to confine the rest of your defense to answering cause of action number one and cause of action number two, and to developing your affirmative defense number one which has to do with res judicata and affirmative defense number two which has to do with unconstitutionality of the ordinances involved.

[fol. 122] Mr. Miller: That is correct, sir.

The Court: I think we can shorten the trial, therefore. Under the circumstances, you go back to your office now and prepare to give me a concise defense tomorrow.

Mr. Miller: Thank you, sir.

The Court: The case is adjourned until tomorrow morning at 10 a. m., unless I hear an objection.

Mr. Charles: Does that mean that Mr. Patterson, Mr. Larkin, Mr.—

Mr. Miller: There are eleven of them.

Mr. Charles: —are excused?

Mr. Miller: I cannot say that now, I do not know.

The Court: Suppose you do this—

Mr. Miller: I have to read over all the examinations before trial as compared with the pleadings and see what I am going to put in.

The Court: Suppose, in lieu of calling these public officials, you be prepared, if you want to, to offer excerpts from their examinations before trial and I will rule. I think you have everything you want in those E. B. T.'s have you not?

Mr. Charles: I would say so.

Mr. Miller: They are fairly complete but I am reminded of what your Honor said in chambers when I said we might shorten this into a very short trial by offering the E. B. T.'s and your Honor I thought expressed a desire to have direct testimony and not put the burden of reading the testimony on your Honor, the testimony of the E. B. T.'s. Maybe I misunderstood the Court.

[fol. 123] The Court: If you merely want to stand up there, Mr. Miller, and say, "I offer these examinations before trial into evidence," I would say no. But if you want to stand up there and read excerpts which I think might be pertinent to the issues—

Mr. Miller: Right.

The Court: Then you can start reading.

Mr. Miller: And your Honor will rule on each question?

The Court: Yes. Of course, you are also going to keep in mind that I have ruled out any evidence under affirmative defense number three; you will keep that in mind.

Mr. Miller: You have ruled out all evidence under defense number three, yes.

The Court: I have.

Mr. Miller: I respectfully except.

(An adjournment was taken until Thursday, June 18, 1959, at 10 a. m.)

Mineola, New York
June 18, 1959

(Appearances as heretofore noted.)

Herbert W. Goldblatt resumed the stand and testified further as follows:

Mr. Miller: If it please the Court, may I make a statement for the record following our discussion yesterday. I have since yesterday afternoon, if your Honor please, gone through my entire file in this case with a view in mind [fol. 124] of conforming with your Honor's directive that

I desist from offering proof with respect to the third separate defense, which was the equitable defense based upon unclean hands and the motive or course of conduct of the officials with respect to condemnation or acquisition of this property the subject matter of the lawsuit.

The Court: And you remember too, my ruling in that respect: that even assuming for the sake of argument you could prove that, my view was that they still had an obligation to enforce the law.

Mr. Miller: Yes, sir, and my statement for the record—I believe the record yesterday indicated I took due exception to your Honor's ruling.

The Court: Yes, you did.

Mr. Miller: My statement this morning, sir, is that I am going to attempt today to confine any proof to the first defense, which is with respect to the prior action before Mr. Justice Hill, wherein the nonconforming use was adjudicated, and secondly with respect to our defense on the grounds of constitutionality or the lack thereof as the ordinance is applied to the property in this case, basically the questions of discrimination, the confiscation of our property rights by the application of the ordinance, the basic constitutional questions which constitute our second defense and counterclaim wherein we seek an affirmative declaration of this court that the ordinance may not be enforced against us on constitutional grounds.

[fol. 125] The Court: When you say constitutional grounds, you mean the due process clause of the Constitution of New York State and the United States Constitution?

Mr. Miller: I am talking both, if your Honor please, of the Fifth and Fourteenth Amendments to the Federal Constitution, that is, Article I, Section 11, of the Constitution of the State of New York, and the Fourteenth Amendment of the Constitution of the United States.

The Court: The equal protection clause, too?

Mr. Miller: Yes. I believe the equal protection is the Fourteenth Amendment, is it not, sir?

The Court: I am sure of it.

Mr. Miller: That is why I mentioned the Fourteenth Amendment of the Federal Constitution. And we claim alleged discrimination with respect also to Article I, Section 11, of the State Constitution, the Constitution of the State of New York.

Mr. Charles, the original County Clerk's file is here in the action Town of Hempstead v. East Meadow Realty and Builders Sand and Gravel Corp., which was tried before Mr. Justice Hill, and I ask you, sir, if we may stipulate to offer into evidence in this trial the decision of Judge Hill dated March 9, 1956 from the original file, as well as the judgment signed by Judge Hill dated April 5, 1956 and entered April 9, 1956 in the office of the Clerk of Nassau County.

The Court: What was the date of the decision of Judge Hill?

[fol. 126] Mr. Miller: The decision of Judge Hill was March 9, 1956. The judgment was granted April 5, 1956, and the County Clerk's stamp for entry of judgment is April 9.

Mr. Charles: Why not offer, in addition to the judgment, the complaint and the answer and the judgment roll and the decision, and then the Court will have the complete file?

Mr. Miller: That is all right.

The Court: That is all on the issue of res judicata which was raised by your first affirmative defense.

Mr. Miller: That is correct, sir.

(Received in evidence and deemed marked Defendants' Exhibit D.)

Mr. Charles: This exhibit consists of the decision, opinion, pleadings, judgment.

At this time, your Honor, do you wish to have argument on the law as to the first?

The Court: No, you have laid your foundation in that respect. You will probably give me briefs, especially if I ask for them.

Mr. Miller. If your Honor will recall, I do not know whether it was in the courtroom or in chambers yesterday, there was colloquy between counsel and the Court with re-

spect to a motion to dismiss a complaint in a prior action between these parties, which motion was decided by Hon. Marcus Christ in this court, and counsel for the Town in this action made a statement to the Court basically to the effect that he believed that would foreclose us from again raising [fol. 127] the same question. I believe I stated to your Honor it was my impression that Judge Christ's decision clearly stated that under issues properly framed and upon a trial of a factual basis the defendants might assert and prove that the ordinance cannot be enforced against them.

In connection with that, sir, I would ask if Mr. Charles would accept this copy on the official memorandum paper of this court of the decision of Mr. Justice Christ which is dated November 30, 1956.

Mr. Charles: Have you the pleadings in that case, or are they before the court? Will you consider them as part of the exhibit, your Honor?

The Court: I shall.

(Received in evidence and marked Defendants' Exhibit E.)

Mr. Miller: If the Court please, the relevant portion of that decision to which I referred which I say does not foreclose us from raising it in this proceeding is the last sentence or the last two sentences of the three-page memorandum decision of Judge Christ.

Mr. Charles: Let the record further show that that action in which Mr. Justice Christ wrote that opinion was discontinued prior to the commencement of this action. In other words, we do not want the Court to be confused as to why there were two actions.

Mr. Miller: I would like the record to be complete on that point. The action was discontinued on request of the [fol. 128] Town Attorney to me after I served motion papers to dismiss, because they repealed their own ordinance and were out of court by their own affirmative act.

The Court: Why don't you gentlemen argue this in your briefs? Just give me the evidence in this case and anything else you want marked in evidence, and I will read your briefs in the quietude of my chambers.

Direct examination.

By Mr. Miller (continued):

Q. Mr. Goldblatt, I show you Defendants' Exhibits D-1, D-2, and D-3 for Identification, dated May 27, 1959, and I ask you, sir, if you have ever seen the properties depicted on those photographs.

A. Yes, I have.

Q. Are those photographs an accurate representation of the physical confines of the land as shown on those photographs?

A. Yes, they are.

OFFERS IN EVIDENCE

Mr. Miller: I offer them in evidence.

Mr. Charles: I object to them upon the grounds that they are immaterial and irrelevant.

The Court: What do they show, Mr. Goldblatt?

The Witness: They show Nassau County storm-water drainage basins in the Levittown area.

The Court: Is it near your property?

The Witness: Relatively near.

The Court: How near?

The Witness: Couple of miles.

Mr. Miller: Judge, this is in connection with the second defense.

[fol. 129] The Court: I will take it for what it is worth at the present time, and as I told you yesterday, argue in your briefs relevancy.

Mr. Charles: Exception.

The Court: For example, you look at that second affirmative defense and it is hard to say what is relevant and what is not relevant at this time. I do not want to foreclose counsel from offering evidence at this time which may pertain to the second affirmative defense.

Mr. Charles: All I want to do is protect my record.

The Court: I am sure you do, and I am helping you to.

(Received in evidence and marked Defendants' Exhibits F-1 through F-3.)

Q. Mr. Goldblatt, I show you Defendants' Exhibits F-1, -2, and -3, and I ask you, sir, would you tell the Court if you have ever personally been at that location.

A. Yes, I have.

Q. Did you make an examination of the earth directly underneath the fence?

A. I did.

Q. Would you tell the Court, please, and show him where you stood when you made this examination, by pointing to the pictures; tell the Court was there a concrete curb 18 inches in depth underneath that fence.

Mr. Charles: I object to the question on the ground it is immaterial.

The Court: What is the relevancy of that, Mr. Miller?

[fol. 130] Mr. Miller: One item of the complaint is that although we have a fence around our property, it is not set on a curb 18 inches in depth in accord with the ordinance. We claim discrimination in our second affirmative defense. We intend to prove to this Court that there exist in the Town of Hempstead numerous instances wherein no such curbs exist and that they are attempting to enforce this ordinance against us and against nobody else, and that is the heart of the constitutional basis of that defense, if your Honor please.

The Court: Unequal protection of the laws?

Mr. Miller: Yes, sir. Unjust discrimination, also. Judge, let me put it this way: If it is such a danger to life and limb and the police power has to be invoked to say you must have a curb, let them dig up all their own sumps and put these curbs under them.

The Court: I will take it and you have an objection, Mr. Charles.

Mr. Charles: And an exception.

The Court: And an exception.

Q. Mr. Goldblatt, continue and keep your voice up.

The Court: If you say something to me and Mr. Cohen does not take it down, it does not help you in the least.

A. On Exhibit F-3 I stood approximately in the same position as the photographer, and then, of course, I walked

[fol. 131] up close to the fence and I inspected it right here in the lower right-hand corner of the photograph, and there is no—

The Court: In other words, that is a true and correct representation of what you saw on the day you visited that area?

The Witness: That is right, and there is no concrete curb under that fence. The same applies to each of these three photographs. I looked at it over here on the left portion of Exhibit F-2 and there was no curb there. Similarly with F-1 towards the left-hand side of the corner, I inspected them through here and there was no curb.

Mr. Miller: If your Honor please, I have a series of twenty-one photographs which for the convenience of the Court the photographer has bound in a volume, I have given a set to my adversary, and I have a set for myself. I would like at this time to offer them as one exhibit. Mr. Charles has stated to me he would not object to the accuracy of the photographs. His only objection, I believe, was on a question of relevancy, and the same argument that I just made with respect to the second affirmative defense on the other photos would apply as to the introduction of these photos.

The photographs, as I have told Mr. Charles and shown him this morning, are photographs of another sand pit in the Town of Hempstead and other excavations and bodies of water in the Town of Hempstead.

The Court: Go ahead, Mr. Charles.

[fol. 132] Mr. Charles: I object to the photographs upon the ground that they are immaterial and irrelevant to the issues in this case.

The Court: I will take them again under those conditions I mentioned yesterday, and I repeated them this morning.

(Received in evidence and marked Defendants' Exhibit G.)

Q. Mr. Goldblatt, would you take this exhibit, please, and as you answer my questions, please, if you have to depict anything on the photographs, point it out to his Honor, and you can hold that exhibit up or place it in front of his Honor on the bench.

A. Yes, sir.

Q. Now, photograph No. 1 of Defendants' Exhibit G, Mr. Goldblatt—correct me if I am wrong as I go through these—is the photograph wherein you are standing in front of a sign on the roof which reads "Milburn Contracting Company"?

A. That is right.

Q. I ask you, sir, where was this picture taken; do you know the street or the road or avenue that this fronts on?

A. It is Milburn Avenue, sometimes called Coes Neck Road.

Q. Sir, did you make an inspection that day with me and the photographer of the physical confines behind that fence, the Milburn property?

A. Yes, I did.

Q. I ask you, sir, and it may seem redundant because it is portrayed in the photograph, but was there a 6-foot-high chain-link fence enclosing that property?

A. No, sir.

Q. As a matter of fact, sir, the fence you were standing in front of is made of what material?

A. Wood.

[fol. 133] Q. Would you tell his Honor in what condition that fence was and perhaps point out if there is anything with respect to condition?

A. It was in a very poor state of repair, it is falling over at one place, and there are several openings in it.

Q. Is there any concrete curb underneath that fence?

A. No, sir.

Q. Would you look at photograph No. 2, please, of Exhibit G. Will you tell his Honor where that photograph was taken?

A. This photograph was taken inside the Milburn sand pit property.

Q. Would you tell his Honor, please, what the material is that is in the foreground and background of the picture from the point where the photographer was standing looking in the direction the picture was taken?

A. Those were principally tin cans which had been incinerated.

Q. Were they covered with rust, Mr. Goldblatt?

A. Absolutely.

Q. Would you tell his Honor—looking at this shot No. 2 in your booklet of photographs, directly past the first little indentation of water, there is a bank, is there not?

A. Yes, sir.

Q. Would you tell his Honor, if you can, how sharp that decline was or what the angle of that bank was?

A. Approximately 45 degrees. Mr. Miller refers to the left central portion of the picture, as far as the angle of the bank goes.

Q. Would you turn to the next photograph, sir. Is that the one where you and I are standing?

A. Yes, sir.

Q. What is the material in the foreground floating in the water, Mr. Goldblatt?

A. Wood, boards.

Q. Mr. Goldblatt, are you familiar with the term known as clean unburnable fill?

A. I am.

[fol. 134] Q. Would boards and lumber be clean unburnable fill?

A. No, sir.

Q. Mr. Goldblatt, what is the approximate distance from where you are standing in this photograph from the fence to the beginning of the excavation?

A. Approximately a foot and a half.

Q. What would you say the angle of drop is along that bank?

A. Sharper than 45 degrees, perhaps 60 degrees.

Q. The next two shots—correct me if I am wrong—are general shots of the Milburn pit?

A. They are.

Q. And I again ask you, sir, is the material shown there clean unburnable fill?

A. It is not.

Q. What does it principally consist of?

A. Wood.

The Court: In what area of the Town of Hempstead is this Milburn pit located?

Mr. Miller: The Milburn pit, Judge, is directly south of Southern State Parkway near WHLI's towers; directly across the road from WHLI's towers you will see a pond.

The Court: In what village or post office area is it?
Mr. Miller: I think it would be Baldwin over there.

Q. Mr. Goldblatt, have you ever checked the map to answer his Honor's question as to what portion of the Township of Hempstead that would fall into?
A. I believe it is Baldwin.
Q. You believe it is Baldwin.

The Court: Near where the Milburn Country Club used to be?
[fol. 135] Mr. Miller: That antedates me, Judge.

Q. Do you have any knowledge of that, Mr. Goldblatt?
A. I am not familiar with that.
Q. Would you tell his Honor what is depicted on the next photograph? Is that this one?
A. Yes. That shows some more material that had been dumped on these same premises.
Q. Was that material clean unburnable fill?
A. No, it consisted principally of wood and trash.
Q. Would you turn to the next photograph, please, Mr. Goldblatt. Mr. Goldblatt, will you tell his Honor where this is located? This is at the Milburn pit, is it not?
A. That is at the Milburn pit adjoining the property of Southern State Parkway which I believe is Long Island State Park Commission.
Q. Is this the way in which you and I found the fence with that hole in it?
A. Yes, sir.
Q. Is that the way that we gained access to the property?
A. That is correct.
Q. Would you turn to the next photograph, please. Is that the one where you are standing with the tape measure?
A. Yes.
Q. Would you tell his Honor, please, and point out to the Court what the approximate size of the berm or distance is from the fence to the commencement of excavation at that point?
A. 1.75 feet.
Q. Mr. Goldblatt, I am on the next one where you are standing above me.
A. Right.

Q. Would you tell his Honor, this is also at the Milburn pit?

A. That's right.

Q. Along the border of Southern State Parkway?

A. That's right.

Q. Would you tell his Honor the distance from the fence [fol. 136] to the point of commencement of excavation as shown on that photograph?

A. 1.1 feet.

Q. Mr. Goldblatt, would you be good enough to point out also to the Court where the measuring rod was placed that I was holding; that is, was it placed at the farthest point against the fence, or was it placed against the fence post which would shorten the distance?

A. It was placed against the fabric of the fence rather than the post, which would give you a larger reading.

Q. In other words, increasing the size of the berm to its maximum at that point?

A. That's right.

Q. Would you look at the next photo, please?

A. Yes.

Q. Where was that taken and would you tell his Honor with relation to photo No. 1, which was the Milburn sign, if you would flip back please to the first page?

A. The photograph you are referring to was taken on Milburn Avenue north of the first photograph in this series, which property is being used by Standard Bitulithic under I imagine a rental agreement with Milburn who owns the premises.

Mr. Charles: I object to that.

Mr. Miller: I will consent that be stricken.

Q. Is this all on the same property?

A. Yes.

Q. In other words, the structure marked "Milburn" in photo No. 1 in this series and the structure shown here with the sign "Standard," is that all on the same property, one adjacent to the other on Milburn Avenue?

A. They are contiguous.

Q. I ask you, sir, was there a 6-foot chain-link fence sur- [fol. 137] rounding the property at this point?

A. No, sir.

Q. Was there any fencing of any kind, sir, and if so, would you tell the Court what it was and show and depict anything on the photograph.

A. A farm fence approximately, oh, 3½ to 4 feet high. I have my left hand on it.

Q. Would you go to the next exhibit, please. Before you change, was there a concrete curb under that fence 18 inches in depth?

A. At no point.

Q. As to the next photograph, would you tell the Court approximately where this picture was taken?

A. This was taken at the southernmost end of the canal which runs down the center of Peninsula Boulevard looking north.

Q. Mr. Goldblatt, have you previously been in the excavation business?

A. Yes, sir.

Q. Are you familiar with the approximate amount of cubic yards that would be taken out of an excavation if you saw it, roughly?

A. Roughly, yes.

Q. Would you say, sir, that the excavation depicted on this photograph encompasses the removal of in excess of 75 cubic yards of earth?

A. Absolutely.

Q. Was there a chain-link fence 6 feet in height set on an 18-inch concrete curb surrounding this excavation?

A. No, sir.

The Court: Is this not part of the brook that goes through Lynbrook and down?

Mr. Miller: If you go down Peninsula Boulevard, Judge, as soon as you go south of Merrick Road—

[fol. 138] The Court: That is part of a brook that has been there for centuries.

Mr. Miller: Yes, there is a stream and I believe that this runs into Mott Creek, if I am not mistaken, and then into Jamaica Bay.

Q. Would you tell his Honor where the next picture was taken.

A. The next picture was taken at Lee Lake.

Q. Where is Lee Lake?

A. In Woodmere.

Q. Is that off Peninsula Boulevard?

A. That's right.

Q. What is the approximate size of Lee Lake?

A. About 1,000 feet long.

Q. Do you know, sir, if the Town of Hempstead has storm drains into Lee Lake?

A. They have.

Q. In fact, are there any shown on this photograph?

A. Yes, there is.

Q. Will you point it out to the Court, please, on the right side?

A. On the right side at the center of the photograph there is what is known as a discharge wall.

Q. In the course of your investigation at Lee Lake did you find other discharge walls?

A. Yes, there were about a half dozen.

Q. What do you call them, catch basins up on the street?

A. They were connected to drainage basins on the street, yes, catch basins is the correct word.

Q. Surrounding the property shown on this photograph, Lee Lake, was there a chain-link fence 6 feet in height?

A. No, sir.

Q. Six feet in height set on an 18-inch curb?

A. No, sir.

[fol. 139] Q. Did you physically inspect the properties which are adjacent to the shoreline?

A. Yes, I did.

Q. Did you walk down to the shoreline?

A. I did.

Q. Would you tell his Honor in your own words, please, what you found at the shoreline with relation to the drop-off into the water?

A. I found that the drop was 45 degrees and sharper, and that it commenced in many instances right from the back yard of these homes which surround the lake.

Q. On those homes, Mr. Goldblatt, did you see evidence of children inhabiting those homes?

A. Oh, yes.

Q. Did you see children physically playing there?

A. Yes, sir.

Q. Sir, did you see other evidence such as bicycles and baby carriages and other things?

A. I did.

Q. And there are no fences, is that correct?

A. There is a fence in certain portions which is commonly known as snow fence.

Q. Those are the slats we see along the roads in the wintertime which the Department of Highways puts up?

A. About 3 feet high and it was in a bad state of repair.

Q. Would you go to the next photograph, Mr. Goldblatt, and tell the Court what is depicted on that photograph.

A. This is also a view of Lee Lake taken from the back yard of one of the homes and it shows in the lower right-hand corner a concrete slab which is a patio attached to the rear of this house. It also shows that the land runs right down to the water and that there is quite a sharp drop off.

[fol. 140] Q. What would you estimate the slope is at that point?

A. 45.

Q. Is it stable?

A. Yes.

Q. At 45 degrees there is stability?

A. Yes, there is.

Q. Did you see any evidence of cave-in or wash-out at 45-degree slope?

A. No, sir.

Q. Would you turn to the next photograph, sir. Would you tell his Honor what that was and where it was taken?

A. This is a photograph of a dredge in what I was told is known as Mott Creek, but it is adjacent to Lee Lake, I believe it is connected. They are dredging fill out of this lake, there is a dredge there, to build a new community of homes, and we were standing between this new community and the dredge at the time of the photograph was taken.

Q. If you would then incorporate the next photograph, I believe one is one view from one point, and then if you swung your body around you would get the next picture, is that right?

A. That's right. The first view showing the dredge is

facing toward the dredge; the other view is turned completely around facing toward the homes.

Q. Did you find people living in those homes?

A. Yes, there were.

Q. Was there any fence of any kind between the property on which you stood from where these pictures were taken down to the water?

A. No fence at all.

Q. Let me ask you, sir, what sort of a drop-off was it from that point down to the dredge pipe?

A. It was a very sharp drop.

Q. Would you tell his Honor where the next photograph was taken, Mr. Goldblatt?

[fol. 141] A. It was taken on Wantagh Avenue, that is a photograph of a Nassau County storm-water storage basin.

Q. Mr. Goldblatt, was this picture purposely taken through the fence for any reason?

A. Yes, it was.

Q. Would you tell his Honor and explain why you directed this picture to be taken that way.

A. We took the picture through the fence in order to relate the slope of the embankment to the diagonal effect of the wire mesh fence fabric, which is a 45-degree angle.

Q. Would you say the slope in there is a 45-degree angle, approximately?

A. I would say that.

Q. Is there any evidence of cave-in or breaking away of the earth with a slope of 45 degrees?

A. No, sir.

Q. Does it appear to you to be stable at 45 degrees?

A. It did.

Q. The next photograph, sir, was that taken from the same place but up higher?

A. That's right.

Q. Over the fence?

A. That was taken from a ladder up against the fence in the previous photograph.

Q. Mr. Goldblatt, past the fourth pole on the right, if you look carefully, would you point out to his Honor, I believe I see a person there, is that you?

A. It is.

Q. What are you holding in your hand, sir?

A. A 6-foot ruler.

Q. What was the distance of the berm from the fence to the edge of the excavation?

A. Five feet.

Q. On the next photograph, Mr. Goldblatt, will you tell the Court where that was taken?

[fol. 142] A. This was taken at a sump on Hempstead Turnpike in Levittown.

Q. Was that sump filled with water?

A. It was.

Q. Is that sump fully enclosed with a chain-link fence 6 feet in height?

A. Yes, it is.

Q. Was that chain-link fence set on a concrete curb 18 inches in depth?

A. No curb at all.

Q. Would you turn to the next photograph, please. Tell his Honor what is depicted on this.

A. This is an abandoned sand pit.

Q. Where is that located?

A. On Wantagh Avenue in Levittown.

Q. Is that property enclosed with a chain-link fence?

A. No, it is not.

Q. About how large would you say that excavation is?

A. Oh, it runs, the entire property is approximately 13 acres, and it is about 90 per cent dug out.

Q. So it is an excavation of some 10 or 11 acres?

A. Approximately 10 acres.

Q. No question then it is in excess of 75 cubic yards?

A. No, no question.

Q. And there is no fence of any kind surrounding that?

A. None at all.

Q. What would you say the depth of that pit is as opposed to the grade of Wantagh Avenue adjacent to it where the cars are shown on the left?

A. Approximately 15 feet.

The Court: That is a dry pit, is it not?

The Witness: It is.

Q. Would you tell his Honor, on the last two pictures, where they were taken and what they show?

A. These photographs, the first one shows a view on Peninsula Boulevard of a piece of property which, by the [fol. 143] sign which we saw of it here, belongs to the City of New York Water Supply Department.

Q. Was that property fully enclosed with a chain-link fence locked against public access except for purpose of gates for ingress and egress?

A. No, it was not.

Q. From the last photograph, the one taken close to the bank, would you tell the Court approximately what the angle of drop was down into the water?

A. That is pretty near a 60-degree drop, very sharp, sharper than 45.

Q. And even at 60 degrees, sir, was the slope stable?

A. Yes, it was.

Mr. Miller: If your Honor please, at this point may I respectfully ask for about a three-minute recess so I can set up a camera?

The Court: Certainly. Would you call these photographs here a brochure?

Mr. Miller: That is Defendants' Exhibit G.

The Court: And this cover?

Mr. Miller: That is the way the photographer delivered it to me.

The Court: It is in evidence now.

Mr. Miller: Surely.

The Court: Mr. Charles, you have your objection to all these pictures, is that right?

Mr. Charles: Yes. Before you set it up, what is the relevancy of this?

Mr. Miller: These motion pictures were taken by me personally, Judge, on the same excursion with Mr. Goldblatt covering principally these same points in the Town but taken of some different views.

[fol. 144] The Court: You have your objection again; same ruling.

Mr. Charles: Thank you.

(While the moving pictures were being projected upon the screen, the following took place:)

Mr. Miller: If your Honor pleases, these pictures commence at Lee Lake, they are taken in my presence and in the witness's presence, Mr. Goldblatt, who is at the screen with a pointer in his hand.

Q. Would you point out the banks and slopes and any drainage points, Mr. Goldblatt.

A. That is the drainage, that is the drainage wall.

Q. That is one of the culverts, I believe, shown on one of the other exhibits, is it not?

A. Right.

Q. Would you point out anything with respect to the back yards, the absence of fences, the presence of fences, as it goes along.

A. Right in here there are no fences. These homes which abut the lake have no fence.

Q. What is that shown there?

A. That is another culvert.

Q. Is that the storm fence you referred to before, Mr. Goldblatt?

A. The snow fence.

Q. And that is the only protection you found around that bank at that point of Lee Lake?

A. That's right.

Q. Is that another culvert behind the fence there?

A. Right in here, yes.

Q. Was that fence in good repair or did it have holes in it?

A. It had holes in it and was in very bad repair.

There is another culvert.

[fol. 145] Q. Mr. Goldblatt, would you please point out to the Court, before I move this film, the circumstances under which this was taken and what is depicted on the screen now.

A. This is a shot from the other side of Lee Lake showing where a portion of chain-link fence had been erected, and it shows a rather large hole under the fence, in fact the whole fence appears to be up on stilts.

Q. It will be clearer when I turn on more light when it runs, but would you say it was large enough for you and I both to crawl through with ease?

A. Yes, on top of each other.

Q. Was there any concrete curb underneath that fence or just the concrete where your pointer is now in which each post is imbedded?

A. That's right, no curb, just the post.

Q. As I run it again, will you point out to the Court, please, with your pointer the distance under the fence which you have just testified to?

A. Right in here.

Q. There was no fence there at all?

A. Along here too. That is right.

Q. In other words, the land has all eroded underneath it?

A. That is right.

Q. I will run it backwards now.

A. Same thing, you can see it right through here. The fabric stops at this line and the earth is right down here.

Q. What is that object just coming into view now, Mr. Goldblatt?

A. That is a catch basin, a drainage catch basin.

Q. So there is drainage from that street into the lake?

A. That's right.

Q. Now would you tell his Honor, please, what is coming up on this next sequence.

A. This is a view of the rear of one of the homes adjoining Lee Lake, and we are coming down the patio showing [fol. 146] the embankment running right off to the water, you can see.

Q. What sort of a drop would you say that was as to angle?

A. At that edge, would you reverse it, please?

Q. All right.

A. At this edge here it drops down at a 45.

Q. That is Lee Lake, is it not?

A. That is right. This shows some of the homes on the other side without any fence at all; the lawns run right down to the water.

Mr. Miller: I would just like to say for the record that I am giving the plaintiff the benefit of the doubt, Judge, by taking it in color so it enhances the pictures. If I had taken it in black and white, I think it would have looked more to

their detriment. I just wanted to appear fair with the object of color.

The Court: I am sure.

Q. What is that, Mr. Goldblatt?
A. This is a view in Milburn's pit.
Q. That is Lee Lake, is it not?
A. No, that is still Lee Lake, I am sorry.
Q. Is that a slope from a back yard?
A. That is right.
Q. What angle would you say that slope is on, sir?
A. That shows the 45-degree quite clearly.
Q. Now would you tell his Honor what you found at this point on Lee Lake.
A. This was the rear of one of the homes which abut right up against the lake and there is a child's playhouse with a doll carriage.
Q. What sort of drop is it off of there into the water?
[fol. 147] A. This is a perpendicular drop along this edge.
Q. You stand close to the water, Mr. Goldblatt?
A. I did.
Q. Did you throw rocks in the water or in any way estimate approximately how deep that is?

Mr. Charles: Do I have a general exception?

The Court: You can have an objection to this question. Are you an expert in measuring the depth of water by throwing rocks, Mr. Goldblatt?

The Witness: I would have had to use a plumb line, your Honor, and I didn't. But I was informed—

Q. Not what you were informed.
A. O. K.
Q. Was the water clear, Mr. Goldblatt?
A. Yes, it was.
Q. Could you see down to the bottom?
A. Well, not too well.
Q. And this was a playhouse, you say, for children?
A. That's right.
Q. Where is this located, Mr. Goldblatt?
A. This is a shot of one of the discharge pipes coming into Lee Lake.

Q. There are houses adjacent to the discharge canal?

A. Yes, it shows the continuity into the canal which runs into Lee Lake. This is one of the canals that runs in, it shows continuity right up to the back yards of these people without any fence.

Q. Do you recall where this was?

A. This was on Mott Creek adjacent to Lee Lake.

Q. That is where you stood to take those other pictures, is it not?

A. That's right.

[fol. 148] Q. Now you are going back up on the bank where you stood?

A. That's right.

Q. What sort of drop was that down from this point down to the pipe which is now coming into the picture?

A. That was very sharp, it was about 45, I would say.

Q. What is that, sir?

A. This is the discharge pipe through which that dredge which is coming into view sucks material out of the bottom of the lake and puts it up on the land to reclaim land for housing purposes.

Q. Is there any fence at that point at all, Mr. Goldblatt?

A. No fence.

Q. That is the adjacent area, is it not?

A. That's right, this is part of the land which has been filled in by that dredge.

Q. Now, there is a house under construction. Were there houses on that street already lived in?

A. Yes, further down.

Q. Did you see children playing around there?

A. I did.

Q. This, is it not, is going around a 360-degree circle?

A. That's right.

Q. Now these homes over here were lived in, were they not?

A. That's right.

Q. Were there any fences there from the back yards dropping off into that canal?

A. No, the property runs right down into the Mott Creek there, which is being dredged.

Q. What is this, sir?

A. This is a view northward of Peninsula Boulevard, the same location as the picture was taken in the other exhibit.

Q. The houses abut directly on that drainage canal on Peninsula Boulevard, do they not?

A. Yes, they do, right over in here.

[fol. 149] Q. Is this what you testified to as to the sign which reads "City of New York"?

A. That is right, it is very hard to see here, but it does say that "City of New York, Water Supply property."

Q. And that point there which you just passed on the film is the end of the fence, is it not?

A. That is correct, there is a wide-open area where there is no fence at all.

Q. Does that fence have a concrete curb underneath it?

A. No, sir.

Q. So, at this point where the camera is now going there was open access to that?

A. That's right.

Q. And just at this point now in the foreground how deep is that drop?

A. That is the very sharp drop, it goes down about 20 feet, about at a 60-degree angle right down to the water.

Q. Could you estimate the approximate size of this body of water?

A. I would say it covers about ten acres.

Q. There are houses on the other side?

A. That's right.

Q. Is that you in the picture, sir?

A. It is.

Q. Now would you tell the Court where we are now on this point of film?

A. Would you show this a little more so I can orient myself?

Q. Yes.

A. This is the Milburn sand pit.

Q. Is that where we entered Milburn pit?

A. That's right, through this opening in the fence.

Q. Let us just go back for a minute and start at the beginning of this sequence.

At this point, sir, is it correct we stopped off at Southern State Parkway adjacent to these homes?

A. That's right.

Q. And we found this fence?

A. That's right.

[fol. 150] Q. Is that fence in good repair?

A. No, there is a large hole which is coming up.

Q. Point out the size of the hole.

A. From here to here (indicating).

Q. That is completely wide-open, is that correct?

A. From top to bottom, about four feet wide, five feet.

Q. From that point we walked in. Is that the Milburn pit in the background, the water?

A. That is correct.

Q. Is that the debris you showed to the Court in the other photograph, the still photo?

A. That is right.

Q. Would that be clean nonburnable fill, Mr. Goldblatt?

A. No, it is wood.

Q. Now what is the angle of that slope there, Mr. Goldblatt? This is the vicinity of where the other pictures were taken where we held the measuring sticks, is it not, sir?

A. That's right, and it is about a 45-degree angle.

Q. Was that an angle of repose? Was there any cave-in there?

A. It was an angle of repose.

Q. You would say this bank was stable at that point?

A. I would.

Q. This is a general sweeping view of the Milburn pit, is that correct?

A. That's right.

Q. And homes around that pit on all sides, are there not, except for parkway on the north?

A. That's right.

Q. Where is this, sir?

A. This is on Wantagh Avenue, the abandoned sand pit, which is in the other exhibit.

Q. Any fence of any kind surrounding that property, a chain-link set on an 18-inch curb?

A. No, sir.

[fol. 151] By the Court:

Q. Is there any water in that?
A. No, there is not, your Honor.

Mr. Miller: May I point out for the record that the ordinance does not specify that pits with water must be fenced in. It says any excavation, and an excavation is denominated 75 cubic yards.

The Court: You argue that in the brief.

By Mr. Miller:

Q. Where was this taken, Mr. Goldblatt?
A. This is on Wantagh Avenue.
Q. Is that the one across the street?
A. Nassau County drainage sump, yes.
Q. I think the other pictures came out better.
A. Yes, this shows the five-foot-wide berm, though.

Mr. Miller: Off the record, it was getting cloudy at that point, Judge.

Q. Where is this, Mr. Goldblatt?
A. This is the other sump on Hempstead Turnpike with water in it.
Q. Have you seen that sump on other occasions?
A. Yes, I have.
Q. Does it always have water in it, Mr. Goldblatt, any time you were there?
A. Yes, it always had water.
Q. Was there a concrete curb underneath that fence?
A. No, sir. This shows the bottom edge here.

[fol. 152] Mr. Miller: That is all.

As soon as I can run that film back through the projector, I would like to have that marked as Defendants' Exhibit H in evidence.

The Court: With the usual objection by Mr. Charles, and Mr. Charles' exceptions also.

Q. Mr. Goldblatt, I believe yesterday you said your sand and gravel business has been in existence for some thirty-two years, is that correct?
A. That is right.

Q. Would you say, sir, that that represents a rather substantial investment in money and equipment?

A. Rather.

Q. Just in round figures, would say it runs into hundreds of thousands of dollars?

Mr. Charles: I object to it.

The Court: Sustained.

Q. Do you know of your own knowledge, sir, approximately what the value of your investment is in structures and equipment at this 38-acre pit?

Mr. Charles: Same objection.

The Court: Sustained.

Q. Do you know, sir, what the assessed valuation is of the sand pit on the tax rolls of the County of Nassau?

Mr. Charles: Same objection, your Honor.

[fol. 153] The Court: I will allow that, if he knows.

A. Approximately $66,000.

Q. Mr. Goldblatt, I am going to ask you a series of questions in connection with items specified in the complaint in this action. The complaint in this action in paragraph eleventh reads, "At various locations the pit excavation commences within 20 feet from the adjoining property line," and I ask you, sir, with reference to that alleged violation, what the distance was from the property line to the commencement of the excavation prior to 1945.

Mr. Miller: That is the date of the ordinance, Judge.

A. Substantially the same as it is today.

Q. I take it, then, substantially the same as shown on plaintiff's exhibits in this case, the cross-sections?

A. Yes, with respect to the width of the top of the berms at various places.

Q. And that width, Mr. Goldblatt, is it wide enough for you to traverse it with equipment?

Mr. Charles: I object to that.

The Court: What kind of equipment?

Q. Can you drive a car around that berm?

Mr. Charles: I object to that.
The Court: I will allow it.

A. Yes, we can.
Q. I will change it to, have you driven a car around it?
A. I have.

[fol. 154] The Court: How wide is a car?

Q. How wide is a car, Mr. Goldblatt?
A. A car is about 7 feet wide.
Q. Have you driven any other equipment around it aside from motor vehicles?
A. Yes, I have.
Q. What equipment?
A. We have run trucks around there, dump trucks.
Q. How wide are dump trucks?
A. Eight feet. We have run bulldozers around it, which run about ten feet in width.
Q. I am reading again from the complaint in this action, Mr. Goldblatt, "In certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the side walls is more than 2 horizontal feet to 1 vertical foot," and I ask you, sir, at what angle is 2 on 1, 2 horizontal over 1 vertical?
A. 30-degree declined angle.
Q. And what angle, sir, is a 1 on 1?
A. 45 degrees.
Q. You have seen the cross-sections in this action, have you not, of Mr. Ott?
A. Yes, I have.
Q. Do you recall what angles as depicted on the plaintiff's exhibit your slopes are?
A. They are slightly more gentle than 45 degrees; approximately 40 degrees.
Q. Would you tell me, please, what the angle was, approximately the angle around that pit, prior to 1945?

Mr. Charles: Same objection, your Honor.
The Court: Same ruling.

[fol. 155] A. From 40 to 45 degrees.
Q. To your personal memory how far back in point of time would you say there existed a 40-, 45-degree slope there?

A. Back as far as 1930 or thereabouts.

Q. You have been personally engaged in this business?

A. Yes, I have.

Q. I mean with the exception of illness or vacation, you daily go there, is that correct?

A. That is right.

Q. Will you tell the Court whether there has ever been a cave-in or tearing away of the bank around this pit?

Mr. Charles: I object to that.

The Court: I will allow it.

A. No.

Q. Mr. Goldblatt, aside from the sand and gravel business, have you been engaged in any other business?

Mr. Charles: I object to that on the grounds it is completely immaterial.

The Court: It may be; I will allow it.

Mr. Miller: Subject to connection, Judge. I want to qualify him for something.

A. Yes, I have.

Q. What business was that?

A. The excavation, excavating business.

Q. Being engaged in that excavation business, did you from time to time build what we call sumps or drainage basins?

Mr. Charles: I object to it.

The Court: I will allow it.

[fol. 156] A. Yes, we did.

Q. Did you personally supervise the construction of them?

A. Yes, I did.

Q. As a matter of fact, did you personally operate any equipment on any of these jobs?

A. At that time, yes.

Q. Were these sumps later dedicated to the County of Nassau?

A. They were.

Q. As a result of your experience in the excavation business, can you tell this Court what an angle of repose is with respect to a side slope of a pit?

A. 45 degrees.

The Court: Angle of what?
Mr. Miller: Angle of repose.

Q. In other words, you feel a 45-degree angle is a safe angle and the bank would be stable?

Mr. Charles: I object to that, your Honor.
The Court: Objection sustained.

Q. Would a 45-degree bank be stable?

Mr. Charles: I object to that.
The Court: Stable in what respect?
Mr. Miller: Stable so it does not cave in.
The Court: I will allow it.
Mr. Miller: That is what you call an angle of repose, Judge, stability of the earth.
The Court: I will allow it.
Mr. Charles: If it was clay, that is one thing; if it was rock—
[fol. 157] The Court: He has been in the business for about twenty or so years and he is in a position to testify as to whether this 45-degree angle, whatever it is, to which he has testified, would or would not.

A. It would be stable.

The Court: Your objection is primarily on materiality and relevancy?
Mr. Charles: That is right.

Q. The next sentence of this paragraph eleventh of the complaint, Mr. Goldblatt, is this: "There is no concrete curb beneath the fence which encloses the described property." I ask you, sir, have you personally visited various excavations and sumps in the Town of Hempstead?
A. I have.

Mr. Charles: Same objection.
The Court: You have your objection.

Q. Did you make personal investigation to see whether there was a concrete curb under any of the excavations or sumps in the Town of Hempstead that you visited?

A. I did.

Q. Would you tell the Court just briefly some of the places that you visited and what you found with respect to concrete curbing.

A. We visited the abandoned pit on Wantagh Avenue where there was no fence at all. We visited the sump on Wantagh Avenue opposite the abandoned sand pit on which there was no curb under the fence. We visited Milburn's sand pit which had no curb under such fence as was there. We visited Lee Lake which had no fence [fol. 158] at all except for this snow fence and that had no curb, and along Peninsula Boulevard there was just the crash rails along the highway. And then also on Peninsula Boulevard we visited the property of the City of New York, Water Supply Department, which was not enclosed by a fence, but the fence that was there, a certain portion of it, did not have any curb on it.

Q. The next paragraph of the complaint, or, rather, the next sentence of paragraph eleventh, reads: "And said fence contains openings, other than necessary gates for ingress and egress, which permit public access to the pits and slopes." I ask you, sir, do you make a personal inspection and cause to be made by your employees a personal inspection of your fence?

A. Yes, I do.

Q. With what degree of regularity?

A. Twice a week.

Q. Are you able to tell this Court whether there exists any openings in that fence other than gates for ingress and egress?

A. There are no such openings.

Q. Is there anything which would permit public access to the pits and slopes?

A. No. They would have to come through the gate. We only keep one gate open, the main gate, when we are open for business.

Q. I read again: "The pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site." I believe we started on this point yesterday just before we adjourned and you testified that that would mean an elevation of roughly 52?

A. The ground water elevation?

Q. The ground water elevation is 50 and therefore 2 [fol. 159] feet above maximum ground water would be 52.

A. That is right.

Q. This allegation is that you have excavated substantially beyond or below elevation 52?

A. Right.

Q. Would you tell the Court when for the first time the excavation at this pit, to your knowledge, was below 2 feet above maximum ground water level?

Mr. Charles: Same objection.

The Court: Same ruling.

A. Around 1930.

Q. Mr. Goldblatt, were you present at the trial of the action before Mr. Justice Hill?

A. I was.

Q. Do you recall the testimony of Mr. Molitor with respect to the lake at your property?

A. Yes, I do.

Mr. Miller: Do you have any objection to putting this in?

Mr. Charles: I will concede that this is a true transcript of the testimony taken at the trial, but I will object to its materiality and relevancy on the same basis that I objected before.

The Court: Is that the testimony taken at the previous trial, the judgment of which Mr. Miller claims is res judicata?

Mr. Charles: Yes, sir.

The Court: To that extent it is material then, is it not?

Mr. Charles: I will withdraw my objection, if the entire minutes go in and not an excerpt.

[fol. 160] The Court: I would say that the minutes of that whole trial and the decision and the judgment all together are relevant on the issue of res judicata.

Mr. Charles: But not excerpts.

Mr. Miller: I presume, then, there is a concession that if I offer this in evidence there will be no objection, the entire minutes.

The Court: On the issue of res judicata.

Mr. Charles: But there is an objection as to the materiality under your second defense.

The Court: Whose testimony is that?

Mr. Miller: There were two points I was going to read; one is a Mr. Molitor who was operating in the pit.

The Court: It is not Mr. Goldblatt.

Mr. Charles: No.

Mr. Miller: No, who was operating in 1927, and the other is Mr. Fay who sold the original equipment down there in 1927 as to the original excavation.

The Court: At the present moment it is only allowable on affirmative defense number one, res judicata. Otherwise, it is pure hearsay.

Mr. Miller: If your Honor please, the purpose of offering any portions of the testimony here at this point is to establish under the res judicata question the initial commencement of excavation there which was deemed protected by the judgment of Mr. Justice Hill. It is just a point of reference of time.

[fol. 161] The Court: It is just on the question of res judicata.

(Received in evidence and marked Defendants' Exhibit I.)

Mr. Miller: I want to read one point in the exhibit.

Mr. Charles: As I understood it, you were sustaining my objection on any evidence read from this on the second defense.

The Court: It is only allowable on the first affirmative defense, res judicata. The whole thing is in evidence now.

Mr. Miller: Yes, and I am just pointing out—the whole thing is in evidence—and I wish to point out to the Court one portion, two portions thereof with respect to the original commencement of excavation and water at this site which has been adjudicated as a lawful nonconforming use. That is the first defense.

The Court: Can you not take care of that in your brief later on instead of reading it? It is all in evidence now.

Mr. Miller: Yes, fine, thank you.

Q. The final allegation in paragraph eleventh of the complaint, Mr. Goldblatt, is this: "Defendants have failed

to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the ordinance." I ask you, sir, number one, is there any portion of your pit where you have removed to the maximum extent allowed under the ordinance?

A. No.

[fol. 162] Mr. Charles: I object to that on the grounds it is conclusion of law.

The Court: Sustained.

Mr. Miller: You may inquire.

The Court: I assume your cross-examination is going to be very short. Use your own judgment, of course.

Mr. Charles: It will.

Cross examination.

By Mr. Charles:

Q. Mr. Goldblatt, you testified that you made two inspections a week around the fence of the pit, is that correct?

A. I did.

Q. And you do that all the time?

A. Yes.

Q. What do you do it for?

A. We do it to make sure that the fence is in proper condition so as to prevent people from getting in there who have no right to be in there.

Q. Sometimes you do find holes under the fence?

A. Sometimes.

Q. Did you ever see anybody making one of those holes?

A. No.

Q. In the whole thirty years you have been there you never saw anybody at any time making one of those holes that you found?

A. I have never seen anyone making a hole.

Q. But you have found holes under the fence?

A. Yes.

Q. You spoke about the abandoned sand pit on the east side of Wantagh Avenue?

A. Yes.
Q. Did not your father own that pit?
A. He did.

Mr. Miller: I object to the question; it is immaterial who owned it.

The Court: I will allow it.

[fol. 163] Mr. Miller: Will counsel fix a time? Owned it when? I think I am entitled to have the time fixed, Judge.

The Court: You can develop that on redirect if you wish, if you think it is important enough.

Q. You spoke about the Milburn sand pit?
A. Yes.
Q. Is that an operating pit at the present time?
A. Not at present.

Mr. Charles: That is all.
Mr. Miller: I have no further questions.

(The witness was excused.)

Mr. Miller: I call Mr. Merklin.

Francis X. Merklin, residing at 43 East Bedell Street, Freeport, New York, called as a witness by the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Merklin, what is your occupation?
A. I am a licensed professional engineer.
Q. Are you testifying here today as a result of subpoena?
A. I am.
Q. By whom are you employed?
A. The County of Nassau, in the Department of Public Works.
Q. What is your position there?
A. Principal drainage designer.
Q. In the course of your duties with the Public Works Department of the County, are you familiar with what [fol. 164] we call sumps or drainage basins?

A. I am.

Mr. Charles: May I have the same objection, your Honor, to this testimony?

The Court: We have not heard what he is going to testify to yet. He is merely being asked about his qualifications, and so forth.

Q. Do you from time to time visit sumps?
A. I do.
Q. Do you as part of your duties have anything to do with plans for sumps?
A. I do.
Q. Anything to do with size of sumps?
A. I do.
Q. The width of berms?
A. Yes.
Q. Type of enclosure?
A. Yes.
Q. That all comes within your department, does it not?
A. That is correct.
Q. Now would you tell me, please, how many sumps there are, total number, owned by the County of Nassau?

Mr. Charles: I object to it.

The Court: You have your objection. Overruled, according to my reasons given yesterday and early this morning.

A. I cannot answer that directly. There are some 400 sumps in the County of Nassau, but just how many are owned by the County at the present time is difficult to determine because some are in the process of construction by developers and other municipalities which have not yet been turned over to the jurisdiction of the County of Nassau.

[fol. 165] Q. Mr. Merklin, I passed a sump on Newbridge Avenue just south of Old Country Road this morning and I believe the number on there was 315. Would that give you any idea? You know the green sign which says "County of Nassau" and the number.

A. They are numbered and I would have to refer to a map to know which sump you have reference to.

Q. I saw a number that said 315. Would that perhaps refresh your recollection as to how many sumps the County has?

A. It would indicate that it has 315, but it could be 350 or 375, I wouldn't know.

Q. For the sake of argument, in other words, shall we say there are at least 300?

A. Yes, you may assume that.

Q. All right. Are these 300 sumps, whatever the exact number is, all enclosed with a chain-link fence 6 feet in height?

A. They are.

Q. Are they all locked against public access and egress except for gates?

A. They are.

Q. And those gates are locked?

A. That is right.

Q. Are all of these fences on these 300-odd sumps set upon a concrete curb 18 inches in depth?

A. They are not.

Q. How many would you say are and how many are not?

A. I wouldn't estimate a guess. Originally, they were not set in concrete curbs, but subsequent to December 15, 1952, they were required to be set on concrete curbs.

Q. Would you say there was a substantial number built prior to December 1952 out of those 300-odd?

A. Depends on what you call a substantial number. In my opinion, yes.

[fol. 166] Q. Would you say 100, 150?

A. I would say 100.

Q. You would say 100. So there are at least 100 sumps owned by the County of Nassau which do not have a concrete curb under the fence, is that correct?

A. That might very well be.

Q. Does the County of Nassau have any specifications with respect to size of berm? You know what I am referring to?

A. Yes, I know what you are referring to.

Q. The width of the periphery between the fence enclosure and the commencement of excavation.

A. There are no written specifications on that. It is a

matter of practice adopted by our department and the approval of the plans for the construction of these sumps.

Q. As a matter of course what does your department approve as to size of berm, width of berm?

A. It varies under different conditions. Where the fence separates a sump being built by developer from other property owned by the developer, the distance is 11 feet from the property line to the top of slope, 10 feet from the fence to the top of slope, the fence being set 1 foot off the property line. Where it abuts adjoining property that is not controlled by the person constructing the fence, the required berm is 16 feet, 1 foot from the property line to the fence, 5 feet for landscaping, an additional 10 feet to the top of slope. Where the slope abuts a street line, the distance is 15 to 16 feet as minimum.

Q. In the course of your duties, Mr. Merklin, have you personally inspected sumps owned by the County located within the Township of Hempstead?

A. I have on occasion. It is not general practice that I inspect them.

[fol. 167] Q. I show you a photograph as part of this multiple exhibit, showing what Mr. Goldblatt said was an excavation located in the westerly side of Wantagh Avenue in Levittown, and ask you if you have ever seen that pit.

A. Is this the first pit north of Hempstead Turnpike on the westerly side of Wantagh Avenue?

Q. I think there is a little one in back of the stores, is there not?

A. I am not sure of that, but is this directly opposite the old sand pit?

Q. Yes, almost directly opposite, about 900 feet north of Hempstead Turnpike.

A. I have seen it.

Q. You have seen it?

A. Yes.

Q. Would you say that is a true and correct representation of the sump?

A. I would believe it to be, yes.

Q. And that sump is owned by the County of Nassau?

A. I believe it is.

Q. And is located within the confines of the Township of Hempstead?

A. That is correct.

Q. Do you see Mr. Goldblatt in the right of the photograph holding a rule through the fence?

A. Yes, I do.

Q. It is not too distinct, but do you see him there?

A. Yes, I do.

Q. Did you hear his testimony here today that the distance of the width of that berm is 5 feet?

A. I did hear it.

Q. Are you in any way from that photograph, or from your personal knowledge of that sump, able to state whether his measurement of 5 feet was correct?

A. I am not sure of it, I didn't make any inspection for that purpose; I have seen this sump on various occasions; I have also seen many others; I would not, without more [fol. 168] recent inspection, estimate what the width of the berm is. It appears to be less than 10 feet in this particular case, I will say that.

Q. Did you at any time in the course of your duties with the County of Nassau receive any communication, summons, complaint, or other document from the Town of Hempstead or the Town Attorney of the Town of Hempstead or the District Court of the County of Nassau with respect to the enforcement of Ordinance No. 16 of the Town of Hempstead as against the sumps under your jurisdiction?

Mr. Charles: I object to that on the grounds it is immaterial, irrelevant and incompetent.

The Court: Sustained.

Q. On the photograph you are looking at you say you visited that sump?

A. I have seen it on occasion, I have had no specific reason to visit it, in driving around I have seen it.

Q. Would you look at the photo just prior to the one of that sump on Wantagh Avenue, and that is the photograph which was shot through a chain-link fence?

A. Yes.

Q. The entire photograph basically covered with the fenc-

ing, the criss-cross of the fencing or the face of the photograph, so we have the right one.

A. That is right.

Q. I ask you, sir, did you hear Mr. Goldblatt's testimony that the angle of the strands on that fence is approximately 45 degrees?

A. I did.

Q. Would you agree with that, sir?

A. I would.

Q. Now looking through those angles and looking at the slope beyond, would you say that it is a fair statement that the slope on that bank is approximately 45 degrees? [fol. 169] A. Not as a result of referring to the angle of the wires on the fence, because the angle at which the picture is taken could vary the impression given. I would therefore not make any estimate of the slope of the sump as a result of that.

Q. Would you also look at the adjacent photograph which was taken standing above the fence, the one with Mr. Goldblatt in it?

A. Yes.

Q. And I ask you, sir, if there is anything in that photograph that would enable you to say what the approximate angle of the slope was at that wall, of that pit.

A. It would look to me as though it varies, that it would be flat in the foreground of the picture, flatter than 45, and it might go up to 45 as you got away from the camera. I believe that the picture is deceptive for purposes of estimating the slope. I wouldn't attempt to estimate the slope.

Q. Have you seen slopes of 45 degrees?

A. I have seen some yes.

Q. In County sumps?

A. Yes, I have seen some.

Q. In the Town of Hempstead?

A. Yes.

Q. At the time you saw them, were the banks stable at 45 degrees?

A. In some cases they were, and in some cases they weren't. The stability depends on the number of conditions surrounding that particular sump.

Q. Mr. Merklin, back in January of this year did the Department of Public Works make a survey of the sand pit the subject matter of this proceeding?

Mr. Charles: When?

Mr. Miller: January.

[fol. 170] A. Yes, the Department of Public Works made a partial survey of the southerly end of the sand pit.

Q. Did the Department of Public Works retain the firm of Lockwood, Kessler & Barlett thereafter to make a topographical map and cross-section of this sand pit?

A. They did.

Q. Did you personally have any conversations with respect to that retainer for those services?

A. With respect to the retainer, no. I was just informed that they were employed by the Department of Public Works to make that survey and had conversations with Mr. Ott as to what information to get for our purposes in the Department of Public Works.

Q. That is what I was leading up to. Mr. Ott testified, I believe, that he spoke with you.

A. That is correct.

Q. In connection with this. Now would you tell me, please, in your own words, what your conversation was with Mr. Ott with respect to the work to be done at the subject property?

A. To obtain a complete topographical survey of the sand pit, and such topographical survey, of course, would be the elevations on the top and at the fence line, the adjacent street, along the slopes, elevation of the surface of the water, and elevations of the slopes and bottom below water; a complete topographical survey, in other words.

Q. And the work that Lockwood, Kessler & Barlett did was to be rendered for the Department of Public Works of the County of Nassau?

A. That is correct.

Q. That is your department, I mean you are associated with that department?

A. That is right.

[fol. 171] Q. Was that to complete work which you had started? You say you did a partial survey.

A. Well, it was actually to do over the work that we had started, and in addition to the completion of it.

Mr. Charles: I move to strike that out on the grounds, your Honor, that this is a part, as I see it, of the third distinct defense which you struck from the pleadings yesterday.

Mr. Miller: I have not asked him anything which—

The Court: If it pertains to the third affirmative defense, of course, it is not allowable. Mr. Miller is contending this has to do with the second affirmative defense. I do not know, maybe, maybe not. As I say, it is hard to say at this moment what is relevant and material under that second affirmative defense, because he has everything in there.

Mr. Miller: You may inquire.

Cross examination.

By Mr. Charles:

Q. All of the sump basins are supervised and maintained by the County, are they not, the ones under the jurisdiction—

A. The ones under the jurisdiction of the County, right.

Q. And all of them have been constructed, have they not, Mr. Merklin, so that the bottom of the pits of the basins are above the maximum ground water level?

A. That is probably 99 per cent true. There may be one or two that have accidentally been constructed below the maximum ground water table to the extent of perhaps a foot or so.

[fol. 172] Q. But the standard regulation for the construction of them calls for the bottom—

A. A minimum of 2 feet above maximum ground water.

Mr. Charles: That is all.

Redirect examination.

By Mr. Miller:

Q. Mr. Merklin, on this 1 per cent that perhaps was by accident below 2 feet above ground water, is it correct that if you went to that extent you would have a lake, I mean once you get below maximum?

A. You would have water standing in the bottom of the basin at such time as the ground water was at its maximum level.

Q. Are you, sir, familiar with the sump located on the northerly side of Hempstead Turnpike about 100 feet west of Division Avenue at Levittown Center?

A. I am.

Q. Is it not a fact, sir, that that sump always has water in it?

A. It has always had water in it when I have seen it, yes.

Q. Have you ever examined that sump to see if there is a concrete curb under the fence?

A. I have never examined it for that purpose.

Q. Do you know of your own knowledge whether there is a concrete curb under that fence?

A. I don't think there is one.

Q. That was constructed much prior to 1952, was it not?

A. Yes.

Q. That was there when Levitt built in 1948, 1949, and 1950?

A. It was built by Levitt.

Q. It was built by Levitt at about that time?

A. I wouldn't hazard a guess as to the date.

Q. Do you recall when Levitt started to build?

A. Levitt started to build after World War II.

[fol. 173] Q. In any event, is it safe to say that substantially prior to 1952 that sump was built?

A. Yes, I would say so.

Q. And it is your testimony that prior to 1952 no concrete curbs were required under fences?

A. That is correct.

Q. Have you, that is, your department, gone back to all the old ones and reinstalled concrete curbs under the existing fences?

Mr. Charles: I object to that, your Honor.
The Court: I will allow it.

A. No, we have not.

Mr. Miller: That is all.
The Court: These are County sumps?
The Witness: That is right.
Mr. Miller: That are located in the Town of Hempstead?
The Witness: That is right.
Mr. Charles: No further questions.

(The witness was excused.)

Mr. Miller: I call Mr. Young.

JOHN C. YOUNG, residing at 78 Marlboro Road, West Hempstead, New York, called as a witness by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Young, would you state your occupation, please?
A. I am manager of the Building Department in the Town of Hempstead.
[fol. 174] Q. Are you appearing here today pursuant to a subpoena?
A. Yes.
Q. Would you tell me, sir, how long you have been associated with the Town of Hempstead?
A. Since May of 1937.
Q. In that period of time what titles or positions have you held with the Town Hempstead?
A. At the beginning it was chief building inspector, and in the latter half of that period I presume it was manager.
Q. How long, sir, have you lived within the County of Nassau?
A. Since 1929.
Q. Are you familiar with the subject matter of this proceeding, 38-acre sand pit in East Meadow?
A. Yes.

Q. Have you personally visited the premises on occasion?

A. Yes, some time ago.

Q. When would you say, approximately your first visit to that place was?

A. Ten or more years ago.

Q. In the course of your duties is it part of your job to enforce in any way the ordinances of the Town of Hempstead for which you work?

A. Yes.

Q. Is it part of the duties of your department or under your supervision to make inspections of real property with respect to the conformity or possible violation of any ordinances?

A. No, I wouldn't say it is. We inspect properties—

Q. Let me ask you this to make it easier: Are the building inspectors under your jurisdiction?

A. They were, yes.

Q. When they were under your jurisdiction they made inspections, did they not?

A. That is right.

[fol. 175] Q. If they found anything that violated an ordinance, did they issue a summons?

A. They did.

Q. From time to time is it not a fact that you yourself have issued summonses?

A. Yes.

Q. And those are summonses as an alleged violation of an ordinance of the Town of Hempstead?

A. That is right.

Q. Those are returnable in the District Court of the County of Nassau?

A. Yes, sir.

Q. Do you have any personal knowledge, Mr. Young, of a proceeding in the District Court of the County of Nassau with respect to the subject property concerning the erection of a fence at the property?

A. Yes, the one—

Mr. Charles: Just a moment. I object to this on the same ground as before, your Honor.

The Court: Sustained.

Mr. Miller: Your Honor sustained that?

The Court: I did.

Mr. Miller: That he has personal knowledge of a proceeding in the District Court?

The Court: I am not interested in that proceeding in the District Court, legally.

Q. Did you make an inspection of the sand pit in this proceeding with respect to the fencing ordinance of the Town of Hempstead?

A. Yes. You mean ten years ago?

Q. Whenever it was.

A. Ten years ago, yes, I did.

Q. At that time was the fence constructed around the perimeter of this property?

[fol. 176] Mr. Charles: I object to that as not being within the issues of this trial.

The Court: I will allow it. It has to do with the subject property, does it not?

Mr. Miller: Yes, it has to do with the matter in the complaint of a curb underneath the fence.

The Court: I will allow it.

(The last question was read.)

A. Yes, practically a whole new fence was constructed around the property.

Q. Did you make personal inspection of that fence?

A. I did.

Q. What type of fence was that, sir?

A. Chain-link fence 6 foot high.

Q. After the erection of that fence did you make an inspection and in due course report as to the construction that had taken place?

A. I did.

Q. Did you have any discussions at the premises with the Goldblatts concerning it?

A. I may have, I don't remember what they concerned now.

Q. Your presence at the pit, sir, was it in connection with an inspection to see that the fence met the requirements of the ordinance which you were enforcing in your official capacity?

A. That is right.

Q. Was this fence put up in conformity with the ordinance?

Mr. Charles: I object to that, your Honor.

The Court: Sustained.

[fol. 177] Mr. Miller: But he is the enforcement officer, Judge.

The Court: That is a conclusion of law.

Q. After you finished your inspection, when the fence was constructed, did you make any memorandum, note, or report as to the completion of that construction?

A. Yes.

Q. In other words, this was a proceeding under your jurisdiction?

A. It was a proceeding.

Mr. Charles: I object to any proceeding, your Honor.

Q. Was there a file that you had that you were working on? You were working on this, were you not?

A. Yes.

Q. Let us call it a file, for the sake of argument. You had something you were working on. Did there come a time when you ended it, when it was concluded?

A. Yes, there did.

Q. Did you sign your name to that conclusion?

A. I presume I did.

Q. When you signed your name to the conclusion, did you close out that file?

A. Yes.

Q. Do you recall, sir, of your own knowledge, at the time you closed it out, had the file been satisfactorily completed?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Was it completed to your satisfaction?

Mr. Charles: I object to that.

The Court: Sustained.

[fol. 178] Q. Ten years ago when you inspected the construction of the fence at the sand pit, did you ever tell

the defendants that they are required to install a concrete curb 18 inches in depth underneath the fence?

Mr. Charles: I object to that.
The Court: I will allow it.

A. No, I did not.
Q. Were you personally familiar with the fence ordinance of the Township of Hempstead which you were—

Mr. Charles: I object to that.
Mr. Miller: May I ask the question first before the objection, Mr. Charles?

Q. Were you personally familiar with the provisions of the fence ordinance of the Town of Hempstead which you say you were enforcing in this file ten years ago?

Mr. Charles: I will object to that.
The Court: He asks his familiarity with the ordinance. Do you object?
Mr. Charles: I withdraw it.
The Court: Proceed.

A. Yes, I was familiar with it.
Q. To your knowledge, sir, was there any provision in there requiring the erection of a concrete curb in 1949 under a chain-link fence?

Mr. Charles: I object to that. The ordinance speaks for itself.
[fol. 179] The Court: It does.
Mr. Miller: I said if he knows, if your Honor please.
The Court: All right. If you want to ask him whether he knows, I will let him answer it.
Mr. Miller: That is what I said.
The Court: But what the ordinance actually says is what is binding on me, not what he says.
Mr. Miller: That is right, sir, but he was the enforcement officer and I am asking him if he has any knowledge of it.

A. No.
Q. When you say "no," you mean there was no requirement?

Mr. Charles: I object to that. The ordinance speaks for itself.

(The last question was read.)

The Court: You can answer that question.

A. No, there was not.

Q. Prior to the erection of this fence in 1949 did you personally issue a summons with respect to the fence which had existed theretofore?

A. That's right, I did.

Q. Did you appear before Mr. Justice Eckenberg of the District Court in connection with this fence?

Mr. Charles: I object to that.

The Court: Objection sustained. You are moving him [fol. 180] to affirmative defense number 3 again.

Mr. Miller: Oh, no, Judge.

The Court: You go back to the issues that you raised in number two.

Mr. Miller: Judge, under—

The Court: Reread your affirmative defense two.

Mr. Miller: Judge, I am directing these questions with respect to my general denial of paragraph eleventh of the complaint. They say there is a violation in not having a concrete curb. I am questioning him about the time when he as an enforcement officer of the plaintiff in this action—

The Court: When was this ordinance passed?

Mr. Miller: The curb requirement?

The Court: Whatever you have reference to.

Mr. Miller: 1958, I believe. It is the amendment of the 1945 ordinance. The 1945 ordinance had no such requirement.

The Court: Objection sustained.

Q. During the course of your duties with the Town of Hempstead, either as a chief building inspector or manager of the Building Department, whatever the designations were—

A. I was probably designated as manager in '49.

Q. At any time that you were employed by the Town

of Hempstead, did you make any examinations of other sand pits or excavations in the Town of Hempstead?

Mr. Charles: I object to that on the ground it is immaterial.

[fol. 181] The Court: I will allow it.

Mr. Miller: On the second defense, Judge.

A. I did.

Q. What other sand pits did you examine?

A. The operating sand pits at that time were Milburn Sand and Gravel and Nassau Concrete Products. They are both in North Baldwin.

Q. Mr. Young, I show you a series of photographs bound in a volume, Defendants' Exhibit G, and ask you if you would start with the first page, sir, and tell me if you have ever seen the locale pictured in that.

A. I don't recognize—I have been to the Milburn Sand and Gravel pit, I don't know what this is now.

Q. Is that familiar to you, sir?

A. This picture isn't, but I have been to the Milburn Sand pit many times.

Q. Would you turn the page and I ask you if that is familiar to you. Look at photograph No. 2.

A. No, I would not be able to recognize that as the Milburn sand pit.

Q. How about No. 3?

A. No. Vaguely. I wouldn't know what pit it was by looking at it. Generally, they all look the same as this. There is no identification marks here.

Q. Would you look at the next three photographs and tell me if there is anything thereon which would refresh your recollection or enable you to recognize the area shown on the photographs.

A. No, there is not. I want to refresh your memory that, as I said before, I have not been to the Milburn sand and gravel pit in, oh, maybe five or six years.

Q. How about the next photograph, the one with the [fol. 182] hole in the fence?

A. That would certainly not disclose any identity.

Q. And the next photograph with the measuring stick between 7 and 9?

A. No. I couldn't tell what pit it was.

Q. How about the next photograph, the measuring stick at one point one and a half, it looks like.

A. No, there is no identification.

Q. Let me ask you this, sir: Viewing this last photograph that we are just discussing, the one with myself and Mr. Goldblatt in it, can you tell me, assuming this is a photograph of the Milburn pit, sir, what the approximate distance was at the time you visited it from the fence to the commencement of excavation at any point?

Mr. Charles: I object to that.

The Court: Sustained.

Q. The Milburn pit was a dredging operation, was it not?

A. Yes.

Q. The mining of sand and gravel by suction?

A. Yes, it was.

Q. That is the same operation as prevailed at the Goldblatt pit?

A. That is right.

Q. Do you know, sir, the depth or approximate depth of the water at the Milburn pit?

Mr. Charles: I object to that on the ground it is immaterial.

The Court: Same line of objection and same ruling on my part.

You may answer, Mr. Young.

A. I had no occasion at any time to measure the depth. By just hearsay I remember it was 30 feet.

[fol. 183] The Court: Just if you know of your own knowledge.

A. I don't know the depth.

Q. Do you have any knowledge, sir, that sometime recently a man was operating a bulldozer at that pit and the bulldozer went into the lake and he drowned?

Mr. Charles: I object to that.

The Court: Sustained.

Mr. Miller: Judge, it may refresh his recollection as to the depth of the water.

The Court: Sustained.

Mr. Miller: I except.

Q. How many times would you say you have made an inspection of the Milburn pit?

A. Oh, over the years probably personally I was there a dozen or fifteen times, twelve or fifteen times.

Q. Did you at any time on any of those twelve or fifteen visits issue a summons to the owners or operators of the Milburn pit for a violation of Ordinance No. 16 of the Town of Hempstead?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Was the berm at the Milburn pit when you visited it wide enough for you to traverse the entire perimeter inside the fence?

Mr. Charles: I object.

The Court: I will allow it, with your usual objection, my usual ruling, and your usual exception noted.

A. Yes, it was.

[fol. 184] Q. Was that wide enough for an automobile?

A. I would say so.

Q. How wide would you say an automobile is, Mr. Young?

A. Six to eight feet.

Q. Was it wide enough for two cars, one abreast of the other?

A. I would not say so. I would say 10 to 15 feet it was at all times that I saw it.

Q. When you visited the Milburn pit were the slopes stable?

Mr. Charles: Same objection.

The Court: What do you mean by "stable"?

Mr. Miller: Was there stability. I do not want to testify.

Q. Mr. Young, would you be in a position to advise the Court by your testimony what we mean by the phrase a stable slope?

Mr. Charles: I object.

The Court: On the usual ground, irrelevant and immaterial?

Mr. Charles: No, but on his qualifications. He asked Mr. Young if Mr. Young thought he was qualified to tell you.

The Court: In other words, I am to determine whether he is qualified to testify as to what is "stable." On the basis of his past experience he ought to know what is meant by "stable" at this time, so proceed.

A. The term "stable" on the bank of the slope of a sand pit means that the earth or the sand remains in position, it doesn't slide or cave in, and that is known as the angle [fol. 185] of repose, and each material has a different angle of repose.

Q. What was the approximate angle of the Milburn pit at the time you visited it?

A. I would say it was generally around 40 degrees, because that is the angle of repose of sand. There were no cave-in I noticed, so I assume it was 40 degrees.

Q. To your eye it appeared stable, it appeared to be the angle of repose, as you call it?

A. To my eye it was stable, there was no evidence of cave-ins.

Q. Was the excavation on your visits to the Milburn pit below 2 feet above maximum ground water level?

A. Yes.

Q. Was the excavation at the time you visited the Milburn pit more than 10 feet below the established grade without a 2 on 1 side slope?

A. No, I won't go with the last—without, you said?

Q. Let me withdraw the question and take it precisely, sir. I am reading now, Mr. Young, from the complaint in this action, which alleges a violation that the excavation was "more than 10 feet below the established grade of the nearest public street," and at the same time that it was to that extent, and I quote again, "the incline of the side walls is more than 2 horizontal feet to 1 vertical foot and said side walls are not supported by retaining walls." Now I ask you, sir, at the time you inspected or visited the Milburn pit No. 1, were there retaining walls supporting the side slopes?

A. No.

Q. Was the angle of slope which you call the angle of repose of 40 degrees greater on incline than 2 on 1, 2 hori-
[fol. 186] zontal feet on 1 foot?

A. Yes, I would say it was.

Q. And was the excavation more than 10 feet below the established grade of the nearest public street?

A. Yes.

Q. Mr. Young, did you ever inspect the fence around the perimeter of the Milburn pit?

A. Yes, every time I went down there personally.

Q. What type of fence material was that?

A. Chain-link fence.

Q. Do you know the height of it?

A. Yes, 6 foot high.

Q. Was that fence set on a concrete curb?

A. No.

Q. Does the Town of Hempstead own any pits, basins, dumps?

A. Not that I know of.

Q. Mr. Young, do you recall being examined before trial on June 6, 1959, in this action?

A. That's right.

Q. I ask you, sir, if you recall this question and this answer, page 19, line 3:

"Q. Does the Town own any dumps or other cavities aside from drainage sumps? Are there any pits used for dumping operations?

A. Yes, I think they are still dumping at Nassau Concrete Products and also one in Elmont."

Mr. Charles: I object to his impeaching his own witness, your Honor.

Mr. Miller: The man is in the employ of the plaintiff in this action, Judge.

The Court: That is not the point.

Mr. Miller: I am not impeaching him; I am just going to ask him does he recall making that answer.

[fol. 187] The Court: Has he answered this on direct as yet?

Mr. Miller: What?

The Court: Have you asked him questions on this point on direct?

Mr. Miller: I asked him and I am trying to refresh his recollection.

The Court: You asked him with respect to sums, did you not?

Mr. Miller: No, I had said pits or dumps.

The Court: Did you say that?

Mr. Miller: Yes.

The Court: Are you trying to impeach him or refresh his recollection?

Mr. Miller: Refresh his recollection.

The Court: All right, to refresh his recollection I will allow it. To impeach, no. However, if you are impeaching him, if that is sworn testimony, it still can be used to impeach, but you are not using that here.

Mr. Miller: No, he did not make a contrary statement on direct, Judge; he just said he did not recall, and when he said he did not recall—

The Court: You are using his sworn testimony to refresh his recollection?

Mr. Miller: To refresh his recollection, that is right.

Q. Now I ask you, sir, do you recall that question and that answer?

A. Yes, I do.

Q. Does that refresh your recollection to my first—

A. I think the previous one that I just said I don't recall, I think you asked me if I knew the Town of Hempstead [fol. 188] owned any sand pits. I do know they are using some. Whether they completely own them I don't know.

Q. Have you visited these, whether they own them or use them?

A. No, I have not. That is not part of my—

Q. I do not mean now. Have you at any time visited them?

A. No—oh, yes, I am sorry, I did when they were sand pits.

Q. When in point of time was that, Mr. Young?

A. Seven or eight years ago.

Q. Were they fully enclosed with a 6-foot chain-link fence at the time you visited them?

A. Yes. Any sand pit was enclosed with a 6-foot-high fence.

Q. Was that 6-foot fence set on a concrete curb 18 inches in depth?

A. Not that I remember, no.

Mr. Miller: No further questions.

Mr. Charles: No cross.

(The witness was excused.)

The Court: Have you any other witnesses available right now?

Mr. Miller: Mr. Morhous is here.

JOHN A. MORHOUS, residing at 134 Park Boulevard, Malverne, New York, called as a witness by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Morhous, would you state your occupation for the record?

A. I am the Town Attorney of the Town of Hempstead. [fol. 189] Q. How long have you served in that capacity?

A. Since April, 1953.

Q. Are you familiar with the pleadings in this action?

A. Very generally, Mr. Miller.

Q. Are you familiar with the previous lawsuits that have been had where the pleadings were subscribed by you between the Town of Hempstead and the owners of this pit?

A. Generally.

Q. Is it the function of the office of Town Attorney to bring proceedings for the alleged violations of the ordinances of the township?

A. It is.

Q. Are you familiar with the proceedings brought by the Town of Hempstead with respect to Ordinance No. 16, either personally, or have you caused an investigation to be made of your files?

A. I have done the latter.

Q. As a result of that investigation, then, are you in a position to state what proceedings have been brought by your office with respect to Ordinance No. 16?

Mr. Charles: As to other sand pits?

Mr. Miller: As to any place, including ours.

The Court: Sustained.

Q. Are you familiar with Section 10 of the ordinance, Mr. Morhous?

A. I would have to refresh my—

Q. Which reads, and I just want one phrase I am picking out, "shall be guilty of a misdemeanor." Do you know that provision of Section 10?

A. I would have to refresh my recollection.

Q. I show you a copy of Oridnance No. 16 and ask you if you would just look at that one phrase in Section 10. [fol. 190] A. The ordinance contains that provision.

Q. Now I ask you, sir, if at any time while you were the Town Attorney, as a result of the investigation you made of the records of your office, has the Town Attorney's Office maintained a criminal proceeding under Section 10 of Ordinance No. 16 against the County of Nassau with respect to violation of Ordinance 16?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Do you have any knowledge as to whether any proceeding under Section 10 of Ordinance No. 16 has ever been brought by your office with respect to any other sand pit privately owned within the Town of Hempstead?

Mr. Charles: Same objection.

The Court: I will allow it with that usual reason I gave you yesterday and also this morning.

Mr. Miller: May I state for the record, Judge, that this line of questioning is with respect to the second affirmative defense and principally unjust discrimination on the constitutional ground.

The Court: I know that. As a matter of fact, I helped you along on that by bringing your attention to the equal protection clause of the United States Constitution.

Mr. Miller: That is correct, sir.

(The last question was read.)

A. Not of my own personal knowledge, Mr. Miller, but if I can refresh my recollection from my files, I can give you that information.

[fol. 191] Q. Surely.

The Court: While Mr. Morhous is looking at his files, I know there is a lot of law under the equal protection clause, a lot of case law, and I assume you will find a case or two to sustain your position, you will submit them, anyway, for my consideration, Mr. Miller.

Mr. Miller: I shall, sir.

A. You are interested, Mr. Miller, only in prosecutions under this particular ordinance.

The Court: You mean injunction suits, do you not?

Mr. Miller: The first question I asked was any criminal proceedings.

The Court: Did you object to criminal proceedings?

Mr. Charles: That is right.

The Court: Sustained. I misunderstood.

Q. Has the Town Attorney's office at any time against a private individual commenced an action for an injunction with respect to the enforcement of the provisions of Ordinance No. 16?

Mr. Charles: I object to that.

The Court: I will allow that for the general reason I have been giving right along.

A. Let me refer to my files again, Mr. Miller.

I find no such actions.

Q. Do you know of your own knowledge, sir, whether or not the westerly side of Wantagh Avenue approximately [fol. 192] 900 feet north of Hempstead Turnpike is located within the Town of Hempstead?

A. That is south of Old Country Road?

Q. Yes, south of Old Country Road; as a point of orientation, Mr. Morhous, this is approximately directly across the street from an old abandoned sand pit on the easterly side of Wantagh Avenue.

A. Yes, I believe it is within the town.

Q. I show you, Mr. Morhous, a photograph in this multiple exhibit (referring to Defendants' Exhibit G) which is the fifth one from the end. Do you have that, sir?

A. I do.

Q. That is the point of reference which you just answered is located within the confines of the Town of Hempstead?

A. Yes.

Q. Now I ask you, sir, if you have any personal recollection or any files which would refresh your recollection as to whether or not your department ever brought an injunctive action against the County of Nassau with respect to the maintenance of the property shown on that photograph.

Mr. Charles: I object.

The Court: I will allow it; against the County of Nassau.

A. No such action has been brought.

Q. Would your files indicate or would you have any personal recollection as to whether or not any proceeding was brought against any person, firm or corporation prior to acquisition of title of that basin by the County of Nassau?

A. There is no record in my files of any such action.

Q. To your knowledge, Mr. Morhous, are there any sand [fol. 193] pits other than the Goldblatt sand pit now operating in the Town of Hempstead?

Mr. Charles: I object to that.

The Court: What was the question again?

(The last question was read.)

The Court: I will allow it.

A. Not to my knowledge, Mr. Miller.

Q. May I ask in what period of time you searched the records of your office which you say you had done?

A. I went back about twenty years.

Q. On Ordinance No. 16, Mr. Morhous, there is a legend that it was adopted on December 18, 1945. Do you recall that, sir?

A. Yes.

Q. The next to the last paragraph of the ordinance repeals Article XVII of the Building Code, do you recall that?

A. No, I don't.

Q. I show you this ordinance, sir.

A. Yes, I see that that is so.

Q. Now I ask you, sir, for this period of time which you have searched the files of your office did you find any injunctive actions, actions for an injunction, permanent or temporary, with respect to the enforcement of Ordinance No. 16; or prior to December 18, 1945 an action for an injunction for the enforcement of Article XVII of the Building Code?

The Court: XVII?

Mr. Miller: It is the predecessor of this one, Judge.

The Court: Sustained. I am giving you a great deal of latitude, Mr. Miller. Every once in a while I have [fol. 194] to sustain the objection right on the record.

Q. Let me ask you this, sir: Do the records of your office indicate the commencement of an action for an injunction against any person, firm or corporation, or entity, for the enforcement of Ordinance No. 16, except as against the defendants in this action?

Mr. Charles: I object to that.

The Court: I will allow it.

A. No, there is no record of any such action.

The Court: This is all on your theory of a violation of the equal protection clause of the United States Constitution.

Mr. Miller: And also the Constitution of the State of New York as to unjust discrimination in the enforcement of the ordinance, Article I, Section 11, I believe it is.

The Court: What subsection?

Mr. Miller: I do not know, Judge. I will be glad to brief it, sir.

That is all.

Mr. Charles: I have no cross.

(The witness was excused.)

The Court: Do you want to start any more witnesses, Mr. Miller?

Mr. Miller: I do not think we have any more now. I would like to suspend for lunch if we may at this point.

The Court: Let us recess for lunch.

[fol. 195]

EXCERPTS FROM EXAMINATION BEFORE TRIAL OF FREDERICK C. OTT

Afternoon Session

(The reel of movie film, previously exhibited to the Court, was received in evidence and marked Defendants' Exhibit H.)

Mr. Miller: If your Honor please, I would like at this time to read into the record certain portions of the examinations before trial of the various witnesses of the plaintiff in this action. Would your Honor want the originals of all of these to follow any of these along?

The Court: No.

Mr. Miller: The examination of Mr. Ott, on page 21, left-hand pagination, line 24:

"Q. Now, in connection with your activities there on that day"—may I interpose, "there" refers to the subject property—"and/or subsequent to it, can you tell me, please, by whom you were retained for these services?

A. By the Nassau County Department of Public Works."

COLLOQUY

Mr. Charles: I move to strike it out on the ground it is part of the third defense.

The Court: What is the relevancy of that? By the way, you have already asked questions of Mr. Ott, anyway.

Mr. Miller: I realize that, sir. The purpose of this is on a question of credibility of Town officials.

The Court: No, then you cannot. You can only read E. B. T.'s on the question of credibility when the witness

[fol. 196] is on the stand. That is his own testimony you are reading; Mr. Ott has already been a witness.

Mr. Miller: That is right, and he testified exactly the same on the stand here. What I want to put in the record is the statement that he made as to who he was retained by, and a statement by another witness who says another statement in connection with a retainer.

The Court: No, if it is only for the purpose of impeachment, the objection is sustained.

Mr. Miller: Then I am afraid we will have to have the Supervisor in.

The Court Where is he?

Mr. Miller: After we finish with these readings.

The Court: What are you going to establish by the Supervisor?

Mr. Miller: A serious question of credibility, Judge. The Presiding Supervisor says that he retained Mr. Ott. Mr. Ott and Mr. Merklin and everybody else say the Department of Public Works of the County retained Mr. Ott.

The Court: I rule that that is a collateral issue in this case; since it is a collateral issue, you cannot contradict him by other evidence.

Mr. Miller: I respectfully except.

The Court: For the purpose of impeachment you have brought in a collateral matter and on the collateral matter you are bound by the testimony of the witness.

[fol. 197] Mr. Miller: Where the witness is the Presiding Supervisor of the plaintiff in this action?

The Court: The witness here was Mr. Ott.

Mr. Miller: I am not impeaching him: I am happy with his testimony; that testimony is correct. I am impeaching the testimony before trial of the Presiding Supervisor of the plaintiff.

The Court: There has been no supervisor testifying here, so you cannot impeach a witness who has not appeared.

Mr. Miller: That testimony is what I am about to read into the record, if your Honor please, and your Honor is ruling that I would have to produce the witness first, if I understand your ruling.

The Court: I thought I knew the rules of evidence until this moment. Now I am confused. You want to impeach a witness who has not as yet testified in this trial?

Mr. Miller: It is my understanding, and I would bow with deference to the Court's ruling if I am incorrect, that at a trial either side may read any part or offer all of an examination before trial actually taken and sworn to prior to the commencement of the trial, regardless of whether the person examined before trial appears as a witness at the trial or not.

The Court: There is no such loose rule as that.

Mr. Miller: Subject only to the right of objection of op-
[fol. 198] posing counsel as to the relevancy or proper necessity of the questions as posed.

The Court: There is no such rule as that, Mr. Miller.

Mr. Miller: Is your Honor ruling that I have no right to read from the examinations if the witnesses have not been here at the trial.

The Court: I am not saying that at all. What is your theory of offering this in evidence?

Mr. Miller: My theory is on the question of credibility of the Presiding Supervisor of the Township who has given sworn testimony in the examination—

The Court: How can you impeach the credibility of a witness who has not appeared to testify at this trial?

Mr. Miller: He has testified at an examination before trial which is sworn testimony, and unless your Honor rules that the question asked at the examination was improper, then it may be read into the record at this trial.

The Court: Mr. Miller, all I can say to you is, if you have the right to read this examination before trial of the Supervisor, then you read the examination before trial of the Supervisor, and any cross examination, if this testimony can be read at this time, should have taken place at the examination before trial. You cannot offer evidence on a collateral matter to impeach him on a collateral matter.

Mr. Miller: If your Honor please, I do not quite follow—
[fol. 199] The Court: Mr. Miller, you cannot impeach a witness in this court until that witness has first testified.

Mr. Miller: Then I except to your Honor's ruling.

The Court: You have the right to take an exception.

Mr. Miller: And I would like to have the record indicate that I respectfully except to the ruling that it is a collateral issue, because the issue concerns the services of Mr. Ott

which are Plaintiff's Exhibits 1 and 2 in evidence concerning the subject matter in the complaint.

The Court: Am I making myself clear? A witness takes the stand, and only after he takes the stand have you the right to impeach his credibility. If you, under the three or four different methods by which you can use an examination before trial, want to impeach his credibility, you can do so only at that examination before trial, that is all.

At any rate, Mr. Miller, the point is this: You cannot impeach a witness who has not even testified at this trial. That is the basic ruling.

Mr. Miller: Judge, when we use the term "impeachment," of course that is a loose phrase, because—

The Court: Not to me it is not.

Mr. Miller: To this extent, Judge: I did not say I wanted to impeach him. I wanted to point out in the record on a point of credibility simply what one witness has said and what another witness has said. The weight and suffi- [fol. 200] ciency of the various items are for your Honor's determination as to whether there is materiality, whether it is a collateral issue, or a direct issue. That I would certainly admit to.

The Court: Let us move on, Mr. Miller.

Excerpts From Examination Before Trial of Edward P. Larkin

Mr. Miller: Examination of Mr. Larkin, direct, page 79, line 19:

"Q. And to your knowledge has the Township of Hempstead ever brought a criminal or civil proceeding pursuant to its ordinance which is attached to the complaint in this action, directed against the County of Nassau to enforce the said ordinance?"

Mr. Charles: I object to that on the ground it is immaterial.

The Court: How did I rule this morning on that similar question?

Mr. Charles: You sustained it.

Mr. Miller: You sustained it on the criminal but allowed it on the civil.

The Court: I sustained on the criminal and allowed on the civil. I will do the same thing now, for the same reasons. That is the line of questions, too, you asked Mr. Morhous, is it not?

Mr. Miller: Yes. Your Honor sustained the objection on the criminal but permitted it on the civil.

The Court: That is right.

Mr. Miller: May I read the answer with respect to the civil?

[fol. 201] The Court: I am very liberal in that respect.

Mr. Miller: May I read the answer now with respect to the civil portion?

The Court: You may.

Mr. Miller: (Reading:)

"A. No."

Mr. Larkin, direct examination, page 83, line 4:

"Q. Have you ever seen Lee Lake?
"A. Oh, yes."

Mr. Charles: I move to strike that out on the same grounds as this morning.

The Court: As to whether he has ever seen Lee Lake? I will let him read it as to whether Mr. Larkin saw Lee Lake or not.

Mr. Miller: (Reading:)

"Q. And do you know the size of it?
"A. Well, it might be roughly 1,000 feet long by 100 feet wide, perhaps."

The Court: All right, I am ruling the same way again. I am letting it in with your objection and your exception.

Mr. Miller: (Reading:)

"Q. And do you know the approximate depth of the water in that lake?
"A. Well, I don't but it varies, I don't think it is more than 3 or 4 feet deep in some spots, it is not actually a lake, it is more like a basin.

[fol. 202] "Q. Does the Township of Hempstead have any drainage facilities into this Lee Lake?

"A. Yes, they do, they have an easement down the middle of it.

"Q. And do they drain storm water from adjacent streets running down into it?

"A. Yes, they do.

"Q. And is it correct, sir, or do you have any knowledge as to whether a three-year-old child drowned there several years ago?

"A. Yes, she did.

"Q. And when was the last time that you personally saw Lee Lake?

"A. Oh, I think that was about last November or December.

"Q. And at the time you saw it, sir, was it enclosed with a 6-foot-high chain-link fence?

"A. You mean was there a closure?

"Q. Was Lee Lake enclosed with a 6-foot-high chain-link fence?

"A. Well, I don't understand your question. In some places it was, and in some place it wasn't.

"Q. All right, then let me put the question this way: Was Lee Lake, the area you are talking about, the area which you said is perhaps 100 feet wide and 1,000 feet long—I am not being too particular about the distance, but that particular area—at the time you last saw it, that particular area, was it fully enclosed?

"A. No."

Line 24:

"Q. Is Lee Lake owned by the Township of Hempstead?

"A. No, sir."

[fol. 203] Page 85, line 1:

"Q. Private property?

"A. Yes, sir.

"Q. Has the Township of Hempstead ever brought any criminal or civil proceedings with respect to Lee Lake and in particular the Ordinance No. 16 of the Town of Hempstead as amended?"

Mr. Charles: Same objection.

The Court: Same ruling.

Mr. Miller: And I will read the answer only with respect to the civil and not to the criminal, because the objection was sustained as to the criminal.

(Reading:)

"A. Not to my knowledge."

The Court: Remember, now, you still have to show me the materiality of all this in your brief.

Mr. Miller: Yes, sir.

The Court: Even though I am allowing it in evidence now.

Mr. Miller: Yes, sir.

Line 8 on page 85:

"Q. Do you know how close the dredging excavation commenced with respect to the property line of this Lee Lake? I presume there is a line around it.

"A. Yes.

"Q. There is water and then there is land around the water, is that correct?

"A. Yes.

"Q. And beyond that land, whatever width it is, there is property owned by other persons?

"A. That's right, it is almost entirely surrounded by the [fol. 204] back yards of houses.

"Q. That was my impression. Now, what are the distances between the property line of the other persons, the non-owners of Lee Lake, and the edge of the dredging or excavation of Lee Lake?

"A. Oh, it varies, in some places it is 100, and in some places it is 70.

"Mr. Charles: Seventy feet or 100 feet?

"The Witness: Yes, 70 by 100, and in some places it is less than 20."

Line 10, page 86:

Mr. Charles: Why don't you finish the answer?

Mr. Miller: Mr. Charles, you can read anything you want in the examination.

Mr. Charles: I do not think you ought to stop in the answer.

The Court: I will let you read and even repeat questions if you think his reading is not complete enough.

Mr. Miller: Page 86, line 10:

"Q. I believe you stated before that this basin was partially enclosed. Do you know what type of enclosure?

"A. Well, there are all kinds of enclosures. For instance, there are stockade fences, there are cyclone fences, there are rail fences. For the most part the lake is surrounded by houses and their back yards run down to it."

COLLOQUY

The Court: Forgive me for interrupting, Mr. Miller, but [fol. 205] you have developed a lot of this same evidence through other witnesses so far, have you not?

Mr. Miller: Judge, this goes to some of the materiality of the photographs which we have put in. They show a continuity, especially the photographs in connection with Lee Lake.

The Court: Go ahead.

Mr. Miller: It is also on the question of the second affirmative defense with the point which we are raising as to unfair discrimination, unconstitutional discrimination; the knowledge of the Town officials as to the existence of other areas which violate the same ordinance.

The Court: All I said when I caused you to give me all this long explanation was that I thought you had developed this same set of facts through other witnesses.

Mr. Miller: I am sorry, sir.

The Court: If you have not, you go ahead.

Mr. Miller: I thought you were asking for an explanation, that is why I gave it. I am sorry, sir.

The Court: I just thought it was repetitive, that was all.

Mr. Miller: The examination of Mr. Herberger, please.

Mr. Charles: May I finish reading from the Larkin exam?

The Court: No, after he reads, you can read. I usually like to follow the practice of a man finishing all his reading first and then your reading in your turn what you think is [fol. 206] pertinent, and if necessary, you can reread the

parts that he has read so there is continuity so far as your questions and answers are concerned.

Mr. Charles: Very well, sir.

EXCERPTS FROM EXAMINATION BEFORE TRIAL OF MR. HERBERGER

Mr. Miller: Mr. Herberger, page 35. He is the Town Engineer. Line 12:

"Q. Do you know of your own knowledge whether the Town of Hempstead owns any sand pits or other basins or excavations or sumps or drainage pits in the Town of Hempstead?"

Mr. Charles: Same objection.

Mr. Miller: (Reading:)

"A. Yes, they do.

"Q. Do you know how many?

"A. I wouldn't know the exact number.

"Q. Approximately?

"A. Of which category?

"Q. Split them up any way that you know that they are. Are there any sand pits which they own or former sand pits?

"A. When you say the Town, you also mean maybe a refuse district of the Town?

"Q. Yes, any Town subdivision municipal district.

"A. Maybe in the neighborhood of four or five.

"Q. Do you have any idea, roughly, of approximately how deep these are below established grade?

"A. On the rubbish dumps they are all filled but one and that is below grade, depending on which street you are talking about, maybe 10, 15 feet.

[fol. 207] "Q. And is that rubbish dump fenced in?

"A. On three sides and part of the fourth, and the fence on the fourth side I think the children have destroyed to a certain extent.

"Q. What type of fence is that?

"A. A chain-link fence.

"Q. And how high is it?
"A. I would say 6 feet.
"Q. Is that fence imbedded in a concrete curb?
"A. No, it isn't.
"Q. 18 inches in depth?
"A. No."

The Court: Excuse me, which property is this, please?
Mr. Miller: This is a rubbish dump owned by the Town of Hempstead, located within the Town of Hempstead.

Line 18:

"Q. And would you say that rubbish dump—did you call it?
"A. Rubbish dump, yes.
"Q. —rubbish dump has more than 75 cubic feet of earth removed?
"A. Yes."

Page 37—if your Honor please, there are only a few questions here that are slightly repetitive of Lee Lake, but it is only half a page and in continuity I will read it.

Page 5:

"Q. Do you have any knowledge of what is called the 800 feet Lee Lake, the Town drainage basin in the vicinity of Woodmere Park?
"A. I have knowledge of what we call Lee Lake, but it is [fol. 208] not owned by the Town.
"Q. Does the Town drain waters into that lake?
"A. Yes.
"Q. That is an artificial basin, isn't it?
"A. At least in part.
"Q. And the Town drains into it?
"A. That's right.
"Q. Is that fenced in with a chain-link storm fence?
"A. No.
"Q. Is there any fence at all around it, to your knowledge?
"A. I believe there is.
"Q. And what would that be made of, do you know?

"A. I think it is a snow fence and possibly some chain-link fence.

"Q. When you say a snow fence, that is what we see along the highway, those little slats?

"A. Correct."

Excerpts From Examination Before Trial of Mr. Merklin

One other, Mr. Merklin, page 107, line 2:

"Q. And what is the accepted practice of the Department"—referring to the Department of Public Works—"with respect to the degree of slope?"

This refers to a side wall of an excavation, Judge.

"A. A slope of 1 on 2."

Now, Mr. Charles, can we agree that 1 on 2 would be a 60-degree declining angle, or shall I recall Mr. Goldblatt to give testimony on that? I think we can stipulate on this, Judge.

Colloquy

The Court: 2 on 1 is what?

[fol. 209] Mr. Miller: 2 on 1 is 30; 1 on 1 is 45; and a 1 on 2 is 60.

Mr. Charles: A 1 foot vertical by 2 foot horizontal is 1 on 2.

Mr. Miller: It is very gratuitous of Mr. Charles to say what the witness means. The witness is very clear and he is a professional man, 1 on 2, and that is a professional phrase, 1 on 2.

The Court: Does it say 1 on 2?

Mr. Miller: It says 1 on 2.

The Court: Then just read what it says there, and then that is the way I will interpret it, 1 on 2.

Mr. Miller: Right, 1 on 2. Can we agree that 1 on 2 is equal to 60 degrees, or shall I call a witness?

Mr. Charles: We can agree that 1 on 2 would be 60 degrees.

Mr. Miller: 60 degrees declining angle. Thank you. You may read.

Mr. Charles: I am reading from page 86, line 2, of the examination of Edward P. Larkin: "There is a fairly substantial amount of land, I'd say for the most part of the shoreline there are from 60 to 100 feet, and that is pure recollection from looking at the charts. But for the most part of the shoreline there is substantial land between the property lines and the existing water lines."

The Court: Before you read further, this has to do with what property, Mr. Charles?

Mr. Charles: Lee Lake, sir.

The Court: Not the subject property.

Mr. Charles: That is right.

[fol. 210] EXCERPTS FROM EXAMINATION BEFORE TRIAL OF EDWARD P. LARKIN READ INTO RECORD

I am reading from page 96 of the examination of Mr. Larkin, at line 22:

"Q. What other excavations does the Town own?

"A. Well, we own a—do you want me to characterize them?

"Q. Well, I would appreciate it if you would tell me what they are as to function—in other words, is it a pond or a hole or is it a dump—and tell me where it is situated and the size of it and anything you know about it.

"A. Well, we own an 11-acre pit that was formerly a sand pit on Averell Boulevard.

"Q. In what town is that?

"A. In Elmont. We own one on Freeman Avenue off Elmont Road. We have one at Pennsylvania Avenue in Roosevelt. We have one on Coes Neck Road, in Baldwin. We have one I believe in Wantagh. We may have more, but those are just some that come to my mind.

"Q. Now, are these excavations or are some of them filled with water?

"A. No, they were but they are all filled in.

"Q. Are they all level with grade?

"A. What grade?

"Q. I mean if you look at it today, if you were standing

there, would it look like a hole or would it look like the same earth that you were standing on?

"A. You know, you are going to think I am quibbling with you, but I am not. I can't really answer that question yes or no. If you stand on Averell Boulevard you are on [fol. 211] grade. If you stand on the back of it, you are about 90 feet above grade.

"Q. I am not taking the scientific meaning of the term of 'on grade.' My question is this: If you were facing, if you were standing on top of the adjoining to this thing and looking at it, would you look into a hole or would you be looking at fairly level ground?

"A. If you looked out from one end you would look into a hole.

"Q. How deep would that hole be?

"A. Oh, it might be 30 to 40 feet.

"Mr. Charles: Well, if you looked at it from the street level, it is level with the street, isn't it?

"The Witness: At one side.

"Mr. Charles: At one side?

"The Witness: Yes.

"Mr. Charles: And there is no water in it.

"The Witness: No water in it.

"Mr. Charles: But as you go back where there formerly was a hill, that hill is still there?

"The Witness: Right, that's right.

"Mr. Charles: But the entire plot is level with the street.

"The Witness: That's right.

"Mr. Charles: And in some instances are now being used as Little League ball parks?

"The Witness: That's right."

The Court: Have you finished your reading monologue, Mr. Charles?

[fol. 212] COLLOQUY

Mr. Charles: I have, sir.

The Court: Have you finished your reading, Mr. Miller?

Mr. Miller: I have finished my reading, if the Court please.

The Court: Now what is next on the program.

Mr. Miller: If the Court please, I have refrained from reading from five or six examinations before trial which I have conducted in this proceeding in line with your Honor's original ruling with respect to the holding back of evidence in connection with the third separate defense, but I wish the record to indicate that I am prepared with an offer of proof, had your Honor's ruling been the other way, to offer evidence by examination before trial and by written documents, principally maps and surveys prepared by the Town of Hempstead Engineering Department, which would show, one, the desire to acquire the real property which is owned by the defendants—

The Court: Wait, you already have my ruling. I have dismissed your affirmative defense three. There is no sense in making an offer of proof at this time.

Mr. Miller: I except again to your Honor's ruling on the record, and I ask your Honor if you would so rule or would rule similarly if I made an offer of proof under the second complete defense and counterclaim with substantially the same proof in connection with the attempts to [fol. 213] permanently restrict the beneficial use of the property so as to be tantamount to a confiscation thereof.

The Court: I will not make any such ruling, no. If you have any evidence to offer under affirmative defense number two, you make your formal offer each time in the proper way. To be blunt, I cannot rule on vagueness.

Excerpts From Examination Before Trial of Mr. Herberger Read Into Record

Mr. Miller: If the Court please, I shall now read into the record examination before trial of Mr. Herberger, the Engineer of the Town of Hempstead, page 40, line 20:

"Q. Do you have those surveys or maps here with you?
"A. No, I don't.
"Q. Do you know how many there are?
"A. How many surveys?
"Q. Yes.
"A. I think we roughed out maybe two or three different surveys to bringing the water here or using the Goldblatt pit, alternate ways of dismissing of the water."

Mr. Charles: Now I move to strike that from the record.

The Court: How is that relative to your affirmative defense number two?

Mr. Miller: Affirmative defense number two, if your Honor please, aside from the allegations that the ordinance is invalid, confiscatory, void and discriminatory, also states that its application would deprive the defendant Goldblatt of the lawful use of his property without due process of [fol. 214] law, and further that application to the premises permanently restricts the beneficial use thereof so as to amount to a confiscation of his property rights without just compensation. It is our position at this point, if your Honor pleases, that the maps which they have drawn for the appropriation and acquisition bear materially on that second defense in so far as any intention to acquire for drainage purposes this property, because if they were to drain into the pit they would confiscate the beneficial use of the pit and deprive us of our lawful business.

The Court: I am reading your paragraph sixth, it is here before me, and I rule that your proposed evidence is irrelevant and immaterial under paragraph sixth of your affirmative defense number two.

Mr. Miller: In connection with the general clauses of the answer which deny the material allegations of the complaint, principally the denials pleaded in paragraphs first and second of the answer, they would incorporate, if your Honor please, a denial to the general allegation that the Town has no adequate remedy at law as alleged in both causes of action of the complaint; and with respect to that allegation of the complaint and the denials as pleaded in the answer, I offer in evidence a series of maps prepared by Mr. Herberger, the Town Engineer, with reference to the subject property and adjacent properties, and the basis of the offer is that there is an adequate remedy at law by [fol. 215] virtue of the impending condemnation proceeding and acquisition of this property.

Mr. Charles: I object to it.

The Court: Objection sustained.

Mr. Miller: Exception.

The Court: For your protection, do you want those maps marked for identification?

Mr. Miller: They are not specified in there because in the examination before trial he just said, "I will produce them and attach them to the examination." We could do this when we suspend, Judge; we could count them up and take the legend off of each one and mark them for identification, if your Honor does not want to take the time now.

The Court: I have plenty of time now, but I think in all fairness to you they should be marked for identification.

Mr. Miller: Yes.

The Court: I want to protect you as much as I want to protect the other party.

Mr. Miller: For the record, the maps which I offered into evidence, I will read the legends of them.

Mr. Charles: Sought to offer into evidence.

Mr. Miller: No, which I offered and which were denied by the Court.

The Court: That is right, he offered them.

Mr. Miller: I offered them.

The Court: And I did not let them in.

Mr. Miller: That is right.

[fol. 216] The Court: Suppose you take all the maps and just mark them as one exhibit.

Mr. Miller: I was just going to read the legend on each one.

The Court; That is not necessary.

Mr. Miller: All right. There is a series of twelve maps which have been supplied to me as part of the examination before trial of Arthur Herberger, the Town Engineer of the Town of Hempstead.

The Court: Staple them together and mark them as an exhibit for identification.

(Marked Defendants' Exhibit J for Identification.)

DEFENDANTS REST

Mr. Miller: The defense rests, if your Honor please, and I would ask the indulgence of the Court to have reasonable opportunity to make an extended motion to dismiss. I am ready at any time the Court is ready to hear me.

The Court: Why don't you give me briefs?

Mr. Miller: I would like a motion on the record if I may have it.

The Court: All right, make your motion on the record.

Mr. Miller: Both sides having rested, if your Honor please, the defendant respectfully moves—

The Court: Have you rested, Mr. Charles?

Mr. Miller: They rested before I started, unless he is going to request rebuttal. Let me sit down.

The Court: He might have rebuttal.

[fol. 217] Mr. Miller: Yes.

Mr. Charles: May I have a couple of minutes for a consultation?

The Court: Surely.

(A recess was taken.)

The Court: Mr. Charles, are you producing any more evidence now?

PLAINTIFF RESTS

Mr. Charles: No, sir. The plaintiff rests.

Mr. Miller: Both sides rest, if your Honor please, and at this time I respectfully ask the indulgence of the Court for a motion to dismiss on the record.

The Court: Yes.

MOTION TO DISMISS

Mr. Miller: If it please the Court, I will address myself first to a motion to dismiss the second cause of action in the complaint herein. After reiterating the standard allegations as to corporate existence, etc., the gravamen of the second cause of action—I will take them seriatim—is five subdivisions principally of the ordinance. Number one is that at various locations the pit excavation commences within 20 feet from the adjoining property line. I respectfully point out to the Court that the prior ordinance which was admitted in the notice to admit specified that a 10-foot berm or width would apply in such excavations. When they changed this ordinance, therefore, from 10 to 20 feet, at most we became nonconforming to it on the basic law of nonconforming use, which I respectfully submit I will have in my brief.

The Town has utterly failed to show any danger either to [fol. 218] the public or to the community at large or to anyone if the berm were 10 feet. The answer is quite obvious as to why they could not show any danger, because Mr. Merklin testified that the county specification for sumps is only 11 feet. We have an exhibit in evidence of a pit on Wantagh Avenue where it is only 5 feet, and yet there is a good angle of repose and a stable bank.

The question then presents itself as to whether or not the requirement of a 20-foot berm is a reasonable regulation. We are dealing with a regulatory ordinance. If the ordinance which is regulatory in nature is unreasonable by its terms or in its application, or if as applied to the instant property it is tantamount to confiscation of our property rights, then it is unconstitutional under our second defense as pleaded and should be stricken.

The second point in paragraph eleventh of the complaint is that we are excavating at a depth greater than 10 feet below grade and not maintaining a 2 on 1 incline. Just briefly, as we had in the trial itself, a 2 on 1 incline is a 30-degree declining angle, as opposed to a 1 on 1 which is a 45-degree angle, as opposed to a 1 on 2, which we agreed was a 60-degree declining angle.

Mr. Goldblatt testified that the pit was below 10 feet below grade in 1927; the very first ordinance of any kind of this township was 1930; therefore, our excavation antedates any ordinance of any kind, zoning or regulatory of any nature, by three years, also bearing in mind that we have [fol. 219] already adjudicated our right to mine sand and gravel and process same on the premises under the first separate affirmative defense, the judgment of which is before your Honor.

The minutes of the first trial before Mr. Justice Hill specify that the lake was 30 feet deep in 1927. Here again we have an unreasonable regulation and an attempt to modify or nullify a judgment of this court rendered by Mr. Justice Hill which gave us a valid vested nonconforming use with respect to our right to mine valuable properties of sand and gravel from this property. In effect, I submit to the Court that Judge Hill said, "Go on home and dig to your heart's content. As long as you don't do any-

thing which is wrong, as long as you don't create a hazard, as long as they cannot come in and show that what you are doing is detrimental to life and limb and property, then just go home and dig." I am, of course, paraphrasing, obviously.

The ordinance is unreasonable in its terms when it embodies a 2 on 1 slope, for the simple reason, first, that it immediately reduced the requirement of a 45-degree angle to a 30-degree angle. The ordinance attached to the complaint reads a 2 on 1. The predecessor, that is, before this ordinance was amended in 1958, one year ago, the original ordinance of 1945, Ordinance No. 16, read—and it is in the notice to admit—a 45-degree angle, and we are maintaining a 45-degree angle, of which your Honor has had testimony [fol. 220] that that is an angle of repose, that it is stable, that in thirty-two years of mining there has never been a cave-in of a bank.

Therefore, I submit that the Town has wholly failed to prove in any respect that the maintenance of a 45-degree angle on our banks constitutes a hazard or a dangerous condition or anything which would require or compel the application of the doctrines of equity in this court on the principle of irreparable injury. There is obviously no danger there, there has never been any danger in thirty-two years of digging at that place. You have had expert witnesses here, employees of the Town and County, who testified that there is an angle of repose and the banks are stable at that angle of slope that exists.

Now with respect to the fence, if your Honor pleases, that is the next item specified. We have a fence, we have complied with the fence ordinance. In the notice to admit your Honor has in front of him the original ordinance of 1934 which required that excavations and other cavities should be fenced in, and I do not have any quarrel with that ordinance whatsoever; it is a very reasonable, proper regulation. The people who have children are entitled to have open excavations fenced.

But they come along in 1958 and say, "Yes, you spent $20,000 in 1949 to put up a fence and everything was fine and dandy, and we approved it and we inspected it." Mr. Young said he was there and he closed out his file on it, and

[fol. 221] he was the chief building inspector. "But now we want you to lift up the fence and put a concrete curb under it, in 1958."

There again, if your Honor please, number one, we are nonconforming as to the later change in an amended ordinance; number two, the requirement of putting in the concrete curb at this time is prohibitive in cost and there has been no testimony adduced that it is necessary. The most they found was that in 7,000 lineal feet of fence there were at two places small 10- or 11-inch high depressions by maybe 20 or 24 inches wide, with a gradual slope on each side of the hole. I think your Honor got tl at question very clearly on the testimony of Mr. Ott with respect to those pictures as to size and dimension. If your Honor will recall, we measured his shoulders so as to see how we would get through there.

Compared with this, we have adduced to your Honor a picture in a similar pit which used to be an operating sand pit, wherein the hole in the fence was so big that we walked in one next to the other, at the Milburn pit. It is in the volume of pictures. That, I say to your Honor, is a hole in a fence; that is not a slight depression under a fence.

We have the testimony of Mr. Goldblatt, which is completely unrefuted, that it is part and parcel of his operation to maintain a proper inspection of his property; that from time to time if they find a hole or depression or declivity it is filled; and that there is never a dangerous condition [fol. 222] existing. I submit it is almost a matter of law that if in 7,000 feet of fence all they could find were those two slight depressions, that is a pretty safe operation, especially when they reinspected and found nothing. So, evidently, they have come to the conclusion themselves, as we know the truth to be, that this is always inspected, and there is no danger lurking in the community.

The plaintiff has failed to show that there is a need for a curb or any possible present danger, and I respectfully contrast to the Court the maintenance of this large sump in Levittown on Hempstead Turnpike west of Division Avenue, which is filled with water, and you have had testimony it has always been filled with water, and as I think Mr. Merklin or Mr. Young said, you do sometimes hit below

the maximum ground water and those pits will always have water in them, and that sump has no concrete curb on it. Therefore, on a question of unjust discrimination on constitutional grounds, how in the world can they come along and try to assess a requirement of lifting up the whole fence and throwing a curb under it as to our property, the only one they ever bring actions against, when the County and Town properties themselves, and some containing water, some without water, have in no way been remedied? I submit that your Honor can take it almost as a matter of law from their own failure to remedy their pits by putting the concrete under it that they do not think it is necessary [fol. 223] enough for the safety of life and limb to the people living in the area of those pits.

The next allegation in the complaint is that the pit has been excavated substantially beyond points 2 feet above the maximum ground water level at the site. I respectfully point out to your Honor again that the testimony at the trial before Mr. Justice Hill showed that this condition existed as of 1927; that there was a lake there at that time 30 feet deep. To assess this provision against this property now in this proceeding you would be saying in effect that the courts have a right to enforce legislation which legislates out of existence a valid, vested, predetermined, adjudicated nonconforming use, because what they are doing here by this provision is to say, "Yes, you have adjudicated your right to mine without limitation on depth before Mr. Justice Hill, but now we say, since you are less than 2 feet above maximum ground water level, you are prohibited from going deeper."

The practical effect of that application, Judge, is to tell us to put a padlock on our door, because I tell your Honor now we cannot dig one more barrel of sand, except maybe on one or two of the berms, and we are out of business if that is put against us. I say on a constitutional basis it would be confiscation of our property without just compensation. There has been no proof offered by the plaintiff that the maintenance of such a lake is in any way danger- [fol. 224] ous. In fact, they have sumps of their own that are always filled with water which are below the water table; there are many lakes and ponds below the water

table; there is nothing inherently dangerous about a lake or a pond.

Therefore, I submit that they have utterly failed to adduce any testimony whatsoever with respect to the need for injunctive relief. There is no irreparable injury shown by having a pond. If that is the case, nobody should ever live on the seashore and nobody should ever live at a lake, it is too dangerous.

On the second cause of action, I further move to dismiss on the ground that the necessary allegation of the complaint that there is an adequate remedy at law has not been met by the plaintiff, in that the ordinance by its own terms specifies that a violation of the ordinance is a misdemeanor. Therefore, there exists an adequate remedy at law for the Township to bring a criminal proceeding in the District Court of the County of Nassau, and on that ground I further move to dismiss the second cause of action.

Further, I move to dismiss the second cause of action on the ground that the plaintiff has utterly failed to prove any irreparable injury to warrant injunctive relief in this case.

I move to dismiss the first cause of action, also on the ground that an adequate remedy at law does exist for enforcement of the ordinance, contrary to the allegation in [fol. 225] that cause of action, and further, also, that no irreparable injury has been shown to warrant the injunctive relief in this action.

All the plaintiff has been content to do here is to come in and say, "Here is my ordinance, here is one man who says that when he looks at it there is not exact compliance with the letter and terms thereof, please give us an injunction." That is their whole case, in sum and substance. They have failed to prove any other dire necessity, need or injury.

Further with respect to the first cause of action, I respectfully move to dismiss the requirement of a permit on the ground that if your Honor will dismiss the second cause of action, there is no need for a permit, because the permit is for the purpose of regulation. If there is nothing to regulate under the alleged violations of the second cause of action, there is no need for a permit.

Secondly, the ordinance by its own terms operates prospectively and not retrospectively, and Section 3, application for a permit, reads: "Before any excavation is commenced for any purpose, the owner shall obtain a written permit from the Town Board." It reads before commencing. We commenced our excavation, if my arithmetic is right, some eighteen years before they had the first regulatory ordinance requiring a permit under which this proceeding is brought. This is the ordinance in this case as last amended in November, 1958. The ordinance by its [fol. 226] very terms does not say that any excavations located within the township shall be regulated by permit. It says before you start an excavation you shall come in and get a permit. We started many years before.

On those grounds and the other grounds which I have argued before the court on the trial, I respectfully ask that the complaint be dismissed in its entirety and that the defendant be granted an affirmative judgment on its second counterclaim that we have a valid, vested nonconforming use as to the prohibitions set forth in paragraph eleventh of the complaint and the alleged violations of this ordinance; and, furthermore, a declaratory judgment that there is no violation existing at this time of the Ordinance No. 16 of the Town of Hempstead.

COLLOQUY

The Court: Thank you, Mr. Miller. Do you wish to say anything in reply for the record, Mr. Charles?

Mr. Charles: No, just that I move for judgment on the complaint, and I ask that the first separate and complete defense be stricken and dismissed, and I also ask that the second separate and complete defense and counterclaim be stricken from the record, and that judgment be granted in accordance with the relief sought in the complaint.

The Court: Is that all, gentlemen?

Mr. Charles: That is right.

The Court: That is your reply to Mr. Miller for the rec- [fol. 227] ord. Now, how much time do you gentlemen wish for briefs?

Mr. Miller: Judge, frankly, I feel it is incumbent upon Mr. Charles and myself to try to accommodate to your Honor's summer schedule. I realize that we are fast approaching the summer. If your Honor possibly might give us an indication of the latest time that your Honor would favorably like to receive the briefs, in other words, may we have, say, ten days, because I would like to get two weekends in on it, Judge, that is what I am thinking of, so I can spend two weekends at the law library in New York.

The Court: Today is June 18. I would like to have your main briefs in by the 29th. Is that pushing you too hard?

Mr. Miller: No, I could do it with two weekends.

The Court: I would like to have your main briefs by the 29th, and I would like to have answering briefs to the main briefs, if you so desire, in by Friday, July 3. Is that pushing you too hard?

Mr. Miller: No. Satisfactory to me. Mr. Charles?

Mr. Charles: Yes, sir.

The Court: I do not know whether you want to get the minutes for me or not.

Mr. Charles: I have the first day's session. I will submit the complete record of the trial with my main brief.

The Court: All right. I am reserving decision until such time as you gentlemen give me your scholarly briefs.

[fol. 228] Mr. Miller: Shall we submit all exhibits with the briefs, Judge?

The Court: Yes. I do not want them now. I would prefer that you file your main briefs with the Court as soon as they are ready. In other words, the moment you exchange your main briefs, file the main briefs with the court so that if I wish to start working on the main briefs I can do so, and then I will await your answering briefs when they come in later on.

Statement That Case Contains All the Evidence

The foregoing contains all the evidence and testimony offered and given upon the trial of this action.

[fol. 229]

IN THE SUPREME COURT OF NEW YORK

COUNTY OF NASSAU

OPINION OF MR. JUSTICE MARIO PITTONI

The Town sues to enjoin the defendants from mining and dredging a certain sand pit located on the east side of Newbridge Avenue in the East Meadow section of the Town until the defendants obtain a permit required by Town Ordinance No. 16, and until violations of Section 4 of that ordinance are cured.

The defendants in their answer claim *res adjudicata*, protection of the *ex post facto*, of the due process and of the equal protection clauses of the Constitutions, and the motives of the Town officials as defenses.

It appears that the subject property, hereinafter sometimes called the sand pit, is 38 acres in size and has been used for the commercial mining of sand and gravel since 1927.

On December 18, 1945, the Town adopted Ordinance No. 16 entitled, "Bank and Pit, Topsoil Removal and Other Excavations". Its declaration of policy (Section 1) states among others that the ordinance was "to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion . . . to remove the danger to health and life caused by deep excavations remaining in the ground: . . . which ordinance will promote the safety, health and general welfare of the people of the Town".

The ordinance then goes on to say:

> "Section 4 (as amended Nov. 25, 1958) (a) No Pit Excavation shall be made within twenty (20) feet of any property line.
>
> (b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the [fol. 230] nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls . . .

(c). . . . All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity . . .

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, . . . or as to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i) The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, . . .

(j). When earth has been removed from any part of any pit excavation area to the maximum extent al- [fol. 231] lowable under this ordinance, . . . such pit or part thereof shall be immediately refilled with clean, non-burnable fill . . . and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads."

In the meantime, and since the subject property was first used as a commercial sand mining and dredging operation, the surrounding area of East Meadow has changed from a sparsely to a densely populated region, and the subject property has become a huge crater, or sand pit, in which there is an artificial lake that extends over 20 acres of the pit. The average depth of the water in this lake is

approximately 25 feet, but in some areas the water is as deep as 48 feet. There is a link fence around the sand pit, but there is no concrete curb beneath it; and there are several holes under this fence, evidently dug by children, and large enough for human beings to crawl through. In numerous areas the pit commences at a distance less than 20 feet from the nearest property line, and in at least one instance the excavation commences at a distance less than 10 feet. The slopes of the sides of the pit in many places exceed two horizontal feet to one vertical foot. Also, the pit is more than 10 feet below the grade of the nearest public street.

Within a radius of 3,000 feet of the center of the sand pit are 2,200 homes with an estimated population of 8,800 persons; within a radius of 3,500 feet are 4 public schools with an enrollment of 4,532 pupils; and within a radius of [fol. 232] 1,500 feet of this pit is a church where each week 3,600 pupils receive religious instruction.

Evidence on behalf of the defendants establishes that there are certain excavations, some dry and some water filled, and bodies of water such as lakes, brooks, streams, creeks, etc. within the town which are not in conformance with the standards of the ordinance. However, there was no evidence as to whether these excavations and bodies were private, governmental, in use, or abandoned. A New York City owned reservoir with no fence and a sharp slope was also shown.

A county official called by the defendants testified that there are approximately 400 water drain basins or sumps in Nassau County. Of these 300 are owned and supervised by the County and have fences around them; but approximately 100 of these still have no concrete curbs under the fences although the County has since 1952 been installing these curbs. The berm width specifications for these County sumps vary with the nature of the sand and the topographical conditions encountered. It was pointed out too that sumps by and of their very nature must be constructed so that the bottom is above maximum level, and that the standard regulation for the construction of sumps calls for a minimum of two feet above maximum ground water.

The first defense raised by the defendants is *res adjudicata*. This is based upon a judgment entered April 9, 1956 in an action by the Town against the same defendants to enjoin them from operating the sand pit in violation of a zoning (Ordinance No. 16, Sec. 1). In the very *Town of ler,* (sic) 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537, denied the injunction on the ground that the [fol. 233] defendants' substantial operation of the sand pit prior to the enactment of the zoning ordinance entitled the defendants to a non-conforming use. The issue in that case was one of vested property rights in the face of subsequently enacted zoning restrictions. The present action by the Town is pursuant to an ordinance which regulates uses regardless of locations or zones under its governmental police powers for "the safety, health and general welfare of the people of the Town" (Ordinance No. 16, Sec. 1). In the very *Town of Somers* v. *Camarco* (308 N. Y. 537, 541), case cited by Mr. Justice Hill, the court said:

> "We do not pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants, or to otherwise lawfully regulate the defendants' business."

A judgment in one action is not conclusive when the two causes of action are different in the rights and interests affected, and the estoppel of *res adjudicata* is limited in such circumstances to the point actually determined. It is clear, therefore, that the causes of action and the issues of these two cases are not the same, and that the substance of the rights or interests established in the first action will not be destroyed or impaired by the prosecution of the second (*Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307, 308).

It should be added that a motion by the defendants to dismiss a similar complaint against them by the Town on the grounds of *res adjudicata* was denied by Mr. Justice Christ on September 13, 1956 (No. 6447—1956, Cal. No. [fol. 234] 209) when he said: " . . . it is plain that the issues indicated by the present complaint were not adjudicated in the prior action".

Another defense is that the sand pit was operated prior to the enactment of the ordinance and for that reason is immune against the exercise of this regulatory police ordinance. However, it is firmly established that a prior non-conforming use, whether judicially declared or not, does not make it immune against laws, ordinances and regulations of a police nature such as the one now in issue (*Queenside Hills* v. *Saxl*, 328 U. S. 80, 84; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, 184 N. Y. S. 2d 64, certiorari denied by U. S. S. C. June 8, 1959; *Health Dept.* v. *Rector, etc.*, 145 N. Y. 32, 43, 44; *Town of North Hempstead* v. *Colonial Sand, etc.*, Hogan, J., 14 Misc. 2d 727, 731, 178 N. Y. S. 2d 579, 583; *People* v. *Gerus*, Johnson, J., Nassau Co., 69 N. Y. S. 2d 283, 287, 288, 289).

The defendants also argue that the ordinance applies only to sand pits which are to be started in the future and that it does not apply to sand pits in being at the time of its enactment. A reading of the ordinance shows no provision exempting sand pits in operation at the time of its enactment, and it is obvious that the ordinance was intended to apply also to pits already in being and in operation. Whereas the opening of future sand pit excavations could be controlled by zoning regulations, the only protection against the abuse of existing uses has to come from these regulatory ordinances. This is particularly true when it has already been held that the defendants have the right to a non-conforming use under the authority of *People* v. *Miller*, 304 N. Y. 105, 107 and *Town of Somers* v. [fol. 235] *Camarco*, 308 N. Y. 537. Under the circumstances, it would be unreasonable to hold that the Town, which was aware of the dangers posed by unregulated excavations (see Declaration of Policy of Ordinance No. 16, Sec. 1), could have intended to exempt the sand pits in operation at the time of the adoption of the ordinance. Ordinances similar to this one have been interpreted as applying to sand pit uses in being at the time of the enactment of the ordinance (*Town of North Hempstead* v. *Colonial Sand, etc.*, Hogan, J., 14 Misc. 2d 727, 731, 178 N. Y. S. 2d 579, 583; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283). In the *Town of North Hempstead* v. *Colonial Sand, etc.* case, Mr. Justice Hogan said:

"Nor is there merit in their contention that the ordinance, by its express language, is intended to apply only to operations commenced after its adoption. It is a well settled rule of statutory construction that an act shall be interpreted in the light of the mischief felt and the objects and the remedy in view (McKinney's Consol. Laws, Vol. 1, Statutes, sec. 95 and cases cited therein). The Town Board cannot have intended in 1946, that an established operation should be permitted to continue untrammeled while a new one of precisely the same nature required drastic controls. It is equally well settled that 'A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination' (McKinney's Consol. Laws, Vol. 1, Statutes, sec. 147). Accordingly, the Court holds that the ordinance [fol. 236] is intended to operate equally upon all operations of a similar nature, regardless of the date upon which each was commenced. This interpretation needs no reconciliation with the Declaration of Policy, the preamble of the ordinance (supra)."

Still another defense raised by the defendants is *ex post facto*. Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (*Calder* v. *Bull*, 3 Dall. 386, 390; *Kentucky Union* v. *Kentucky*, 219 U. S. 140, 152, 153; *Bankers Trust* v. *Blodgett*, 266 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, aff'd 301 N. Y. 476; 16 C. J. Secun., Const. Law, Secs. 435, 437).

The defendants also contend that the ordinance is unconstitutional in that it is confiscatory and unreasonable as applied to them. In this respect they contend that the plaintiff has failed to establish the reasonableness of the ordinance itself. But it is fundamental that an ordinance such as this is presumed constitutional (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210); that the burden of showing the ordinance to be unreasonable rests upon the assailant (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *N. Y. Trap Rock Corp.* v. *Town of Clarkstown*, 2d Dept.,

1 App. Div. 2d 890, 149 N. Y. S. 2d 290, 293, aff'd 3 N. Y. 2d 844); and that this unconstitutionality must be established beyond a reasonable doubt (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 539, 540, 541). Only as a last resort may courts strike down legislative enactments on the [fol. 237] ground of unconstitutionality (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Matter of Ahern* v. *South Buffalo Railway Co.*, 303 N. Y. 545, 555, aff'd 344 U. S. 367).

Under the tests as above stated the defendants have failed to sustain their burden of proof; in fact, little, if any, evidence was adduced to show the unreasonableness of the provisions concerning the width of the berms, fences, depth requirements and the like. They did give testimony that no cave-ins had occurred at the sand pit within the past thirty years. However, even if that be true, the Town is not precluded from anticipating a danger and providing for a protection against it before it materializes. This is proper within its police power (*City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 3 Dept., 284 App. Div. 598, 132 N. Y. S. 2d 390, 392). Against this danger clearly recognized by the Town (Ordinance No. 16, Sec. 1), the defendants produced nothing to show that the ordinance had no reasonable relation to the dangers and undesirable features inherent in their sand pit.

Even without the benefit of the presumption of validity the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers. Thus, the requirements concerning setbacks, slope requirements, fences, retaining walls, maximum ground levels and other such requirements, all provide protection against the danger of cave-ins, falls and drownings. These requirements are particularly pertinent here where the sand pit is a huge sprawling crater filled with water to an average depth of some 25 feet and forming a permanent, artificial lake of [fol. 238] stagnant water in a densely populated community with thousands of children.

Then too, the right to use one's property may run in conflict with the interests of adjoining land owners. It is one thing to use your property—it is another to empty, to

exhaust or to deplete your property so as to cause cave-ins or otherwise undermine the properties of adjoining land owners. It is obvious without further belaboring the point that the deeper the digging and the closer to the adjoining land, the greater the danger to the latter and the homes thereon caving in.

Other considerations, such as the detrimental effect of this sand pit on the property values in the neighborhood, although not by themselves persuasive, add support to the reasonableness of this ordinance (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co., Inc.* v. *Thompson*, Hallinan, J., 68 N. Y. S. 2d 159; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283, 291).

It may be that the enforcement of this ordinance will result in some economic hardship to the defendants; however, the exercise of police power in the interests of the public at large is generally in conflict with individual interest; and if the end sought is legitimate and the law is not arbitrary the individual interest must bow to the interest of the general welfare. This is particularly true when the object of the law poses a serious threat to public safety (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 302; *Hadachek* v. *Sebastian*, 239 U. S. 394).

In support of the defendants' contention that their property is being confiscated, there is nothing in the evidence to sustain it. There is no evidence to show that the defen- [fol. 239] dants cannot conform to the ordinance or what the cost to the defendants would be if they attempted to conform. Under the circumstances the Court cannot guess or read into the record proof which is not there (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505). In the *Rentways* case, Judge Fuld said:

> "...defendants, though they have attacked the ordinance as confiscatory, have completely failed to establish or present proof that there has been confiscation in fact.... Completely absent is any showing that ... if such structure were impossible, that such could not be converted to some other profitable use."

Even if the defendants had established that the enforcement of the ordinance were a practical prohibition, it would not be of assistance to them in this case where the

danger to the public safety and welfare is a real and serious one. (*Hadachek* v. *Sebastian*, 239 U. S. 394; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283, 287, 288, 289; *Lizza & Sons, Inc.* v. *Town of Hempstead*, Johnson, J., 69 N. Y. S. 2d 296, aff'd 272 App. Div. 921, 71 N. Y. S. 2d 14.)

Although the defendants did not allege the protection of the equal protection clauses of the Constitutions in their answer, they did take the position at the trial that the prosecution of this action against them constitutes discriminatory enforcement; that is, a failure to enforce the ordinance as against "other areas which violate the same ordinance." If we assume, for the sake of argument, laxity on the part of the public officials in the enforcement of the ordinance so as to result in unequal application of the law, that would [fol. 240] not by itself constitute this present action a violation of the equal protection clauses. It is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the ordinance that such an objection can be sustained (*Williamson* v. *Lee Optical*, 348 U. S. 483, 489; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 15; *People* v. *Friedman*, 302 N. Y. 75, 80, 81).

In the *Friedman* case the court said that it is not required under the equal protection clauses that the ordinance "be perfectly symmetrical in its pattern of exclusion and inclusion." And again, quoting from the same case, the proof here does not show "a pattern of discrimination conciously practiced, as in *Yick Wo* v. *Hopkins*, 118 U. S. 356; it merely indicated some non-enforcement as to certain other businesses, many of which were allowed to remain open for the sale of permitted commodities."

An examination of the defendants' evidence fails to show that they have sustained their burden of proof in this respect. Their evidence merely establishes that certain excavations, some dry and some water-filled, and certain bodies of water, such as lakes, brooks, streams, creeks, etc. within the Town exist without conforming to the standards of the ordinance involved. The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use. Furthermore, none of these were shown to be presently operated or oper-

ating sand pits; against which the ordinance is directed. Also, during the trial the defendants took the position that the ordinance should have been enforced against the Nas-
[fol. 241] sau County sumps; however, these county properties are dedicated to a vital public use and therefore do not come within the terms of the ordinance (Secs. 2 and 9). Then too, what authority would the Town have to act against the County, another and superior governmental body?

If the defendants contend that the exemption of these County properties constitute discrimination, not in the enforcement but on the face itself, then too that contention is not acceptable. The equal protection clauses do not deprive a municipality of the power to classify in the adoption of police power regulations; for it is well recognized that evils in the same area may be of different dimensions and proportions requiring, at least in the legislative body's opinion, different remedies (*Tigner* v. *Texas*, 310 U. S. 141); and the legislative body may confine its regulations and restrictions to those cases where the need is deemed to be clearer or more apt to exist (*Packer Collegiate Institute* v. *University of the State of New York*, 3 Dept. 273 App. Div. 203, 208, 209, 76 N. Y. S. 2d 499, 505; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379). "With the wisdom of such choice the courts have nothing to do; it is a matter solely for the legislature to consider." (*Packer Collegiate Institute* v. *University of the State of New York*, 3 Dept. 273 App. Div. 203, 209, 76 N. Y. S. 2d 499, 505).

Clearly, there is a sufficient basis for the classification in the present ordinance. These County sumps, or basins, differ from the permanently flooded sand pit involved herein. First, the existence of these basins or sumps is a necessity throughout Nassau County as a matter of survival. They must from time to time contain varying amounts of [fol. 242] rain water; but this is not a permanent condition. It continues or lasts only so long as it is necessary for the trapped waters to run back into the ground. Furthermore, these basins or sumps all fall within the jurisdiction of the County of Nassau and are subject to the rules and regulations of that municipality. Thus, the County sumps or

basins are sufficiently distinct from the sand pit or sand pits affected by the ordinance to take this case out of the equal protection clauses of the Constitutions.

The defendants' further contention that the Town has failed to sustain the burden of proof on the inadequacy of a remedy at law is specious. The power to bring a criminal prosecution against the defendants for a violation of the ordinance herein is not such an adequate remedy at law which ordinarily bars injunctions. That is hornbook law for which no citation is needed. Furthermore, Section 135 of the Town Law states:

> "The Town Board may . . . maintain an action or proceeding in the name of the town in a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation of any . . . ordinance, rule or regulation, *notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation.*" (Town Law, Sec. 135, as amended L. 1955, c. 326; L. 1958, c. 606.) (Emphasis supplied.)

The last point raised by the defendants is the alleged motives of the Town officials in bringing this injunction suit to court. It must be pointed out at the very outset that on principle alone this contention is not acceptable. Any prior action or lack of action on the part of public officials may not be used as a bar to the bringing of an action [fol. 243] when the action is in a representative capacity on behalf of the public. Public officials have no power and no right to waive their duties or obligations to enforce the law on behalf of the public for whom they are public servants. In other words, their individual actions are not binding upon the public whom they serve and on whose behalf actions such as this are and must be prosecuted. In short, the motives of the officials enforcing the ordinance are not relevant in this case (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467; *Waterloo Woolen Manufacturing Co.* v. *Shanahan*, 128 N. Y. 345, 362).

In the *Chase-Hibbard* case the court said: "If the public authorities were authorized to do what they did do with

the river channels, the reasons that moved them do not concern the plaintiff . . . The assignment of an improper motive, or reason, for doing an act, which the municipality was authorized to perform could not make the act illegal."

In the *Waterloo* case the court said: "If the State has the right . . . then the motives that underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff."

It does not appear that the defendants have raised any other issues.

The Court thus finds that Ordinance No. 16 and the enforcement thereof are valid exercises of the Town's police power; the plaintiff is therefore entitled to the relief demanded in the complaint.

This is the decision of the Court pursuant to Section 440 of the Civil Practice Act.

Settle judgment on notice.

J.S.C.

[fol. 244]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[Title omitted]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, subject to the approval of this Court, that the printing of the following exhibits:

Plaintiff's Exhibits:

1—Ordinance No. 16

2—Aerial photograph

3—Topographical survey plotting

4—Cross-sections and index

5A-5B—Two photographs

6A-6V—Twenty-two photographs

[fol. 245]

Defendant's Exhibits

A—Letter

B-1 & B-2—Photographs

C—Drainage plan map

D—Judgment roll

E—Decision November 30, 1956

F-1-3—Photographs

G—Twenty-one photographs

H—Reel of movie film

I—Transcript of testimony

J—Maps and surveys

may be dispensed with, in the interest of economy and to avoid unnecessarily encumbering the record, without prejudice to the right of any of the parties to refer to the same in the briefs or on the argument with the same force and effect as though printed in full.

It Is Further Stipulated and Agreed that upon the argument of this appeal the original or copies thereof will be handed up to the Court.

Dated: New York, September 25, 1959.

Edward M. Miller, Attorney for Defendants-Appellants.

John A. Morhous, Town Attorney and Attorney for Plaintiff-Respondent.

[fol. 246]

STIPULATION SETTLING CASE—September 25, 1959

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the foregoing case contains all of the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated: New York, September 25, 1959.

Edward M. Miller, Attorney for Defendants-Appellants.

John A. Morhous, Town Attorney and Attorney for Plaintiff-Respondent.

ORDER SETTLING CASE—September 29, 1959

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated: New York, September 29, 1959.

Mario Pittoni, J. S. C.

[fol. 247] STIPULATION WAIVING CERTIFICATION—September 25, 1959 (omitted in printing).

ORDER FILING RECORD IN APPELLATE DIVISION —September 29, 1959

Pursuant to Section 616 of the Civil Practice Act, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, Second Department.

Dated: New York, September 29, 1959.

Mario Pittoni, J. S. C.

[fol. 249]

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

against

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants-Appellants.

STATEMENT UNDER RULE 234

This is an appeal from a judgment entered in the office of the County Clerk of Nassau County on August 4, 1959 which adjudged that Ordinance No. 16 of the Town of Hempstead and enforcement thereof, as applied to the activities and operations of defendants-appellants, are valid exercise of the Town's police power. The judgment enjoins the defendants-appellants from conducting their dredging and excavating of land belonging to them and dismisses the defendants' counterclaim which sought a judgment declaring the unconstitutionality of the Ordinance as applied to defendants' business and operations.

The judgment was affirmed by the Appellate Division, Second Department.

[fol. 250] Leave to appeal to the Court of Appeals was denied by the Appellate Division.

Defendants filed their notice of appeal to appeal to the Appellate Division to the Court of Appeals.

Defendants moved in the Court of Appeals for an order certifying their right to appeal to the Court of Appeals as a matter of right on the ground that the appeal involves directly a constitutional question; or in the alternative, for an order granting defendants' permission to appeal to the Court of Appeals. By order dated April 28, 1960, the Court of Appeals denied that part of the motion which sought leave to appeal on the ground that defendants had an appeal as a matter of right because a constitutional question is directly raised on this appeal.

Plaintiff is represented by John Morhous. Defendants-appellants are represented by Baar, Bennett & Fullen and Edward M. Miller, who have been substituted in place of Edward M. Miller. Except as stated, there have been no changes of parties or attorneys since the commencement of the action.

[fol. 251]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—March 10, 1960

Please Take Notice that the defendants-appellants above named, relying solely upon questions directly involving the construction of the 14th Amendment of the Constitution of the United States of America and Article 1, Sections 6 and 7 of the Constitution of the State of New York, hereby appeal as of right to the Court of Appeals of the State of New York from the Judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, which unanimously affirmed a judgment of the Supreme Court of Nassau County in the above entitled proceeding, entered in the office of the Clerk of the County of Nassau on the 4th day of August, 1959, which Judgment adjudged (1) that Ordinance No. 16 of the plaintiff Town and the enforcement thereof are valid and con-
[fol. 252] stitutional and proper exercises of the plaintiffs-respondents' police powers, and (2) that defendants' counterclaim which directly raises the issue of the constitutionality of Ordinance No. 16 be dismissed, and defendants-appellants appeal from each and every part of the said judgment as well as from the whole thereof.

Dated: March 10, 1960.

Yours, etc.,

Baar, Bennett & Fullen and Edward M. Miller, Attorneys for Defendants-Appellants, Office & Post Office Address, 29 Broadway, New York 6, N. Y.

To:

John A. Morhous, Esq., Town Attorney and Attorney for Plaintiff-Respondent, Town Hall, Front Street, Hempstead, New York.

Clerk of the County of Nassau.

Clerk of the Appellate Division of the State of New York, Second Judicial Department.

[fol. 252a]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of December, 1959.

Present:

Hon. Henry G. Wenzel, Jr., Acting Presiding Justice, Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

Town of Hempstead, Respondent,

—v.—

Herbert W. Goldblatt and Builders Sand & Gravel Corp., Appellants.

Order of Affirmance—December 29, 1959

The above named Herbert W. Goldblatt and Builders Sand & Gravel Corp., the defendants in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the

office of the Clerk of the County of Nassau on the 4th day of August, 1959, after trial, adjudging, inter alia, that a certain ordinance and the enforcement thereof are valid exer- [fol. 252b] cises of the police power of respondent, and that appellants be enjoined from conducting such operations, herein, and the said appeal having been argued by Mr. Edward M. Miller of Counsel for the appellants and argued by Mr. William C. Mattison of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unanimously affirmed, with costs.

Enter:

John J. Callahan, Clerk.

[fol. 253]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

against

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants-Appellants.

JUDGMENT OF AFFIRMANCE WITH NOTICE OF ENTRY—
January 21, 1960

The defendants above named having appealed to the Appellate Division, Second Department, from the judgment entered in this action on the 4th day of August, 1959 in the office of the Clerk of Nassau County, which judgment adjudged, inter alia, that a certain ordinance and the enforcement thereof are valid exercises of the police power of respondent and that defendants be enjoined from conduct-

ing certain of their operations, and the appeal having been heard at a term of the Appellate Division of the Supreme Court, Second Department, and an order of said Appellate Division having been made and entered unanimously affirming said judgment with costs of said appeal to the respondent:

Now, on motion of Richard P. Charles, 32 Court St., Brooklyn, N. Y., Attorney for the respondent;

[fol. 254] It is hereby adjudged that the said judgment be, and the same hereby is, unanimously affirmed, and that the Town of Hempstead, Front St., Hempstead, the respondent herein, recover of Herbert W. Goldblatt of 127 Stevens Ave., Hempstead, N. Y. and Builders Sand & Gravel Corp., of Newbridge Ave., East Meadow, N. Y., the appellants herein, the sum of $339.67, costs and disbursements of said appeal and that it have execution therefor.

January 21st, 1960.

Francis J. Anderson, Clerk.

NOTICE OF ENTRY

Sir:

Please Take Notice that the within is a true copy of a Judgment this day duly made and entered herein in the office of the Clerk of Nassau County.

Dated, N. Y., January 21st, 1960.

Yours, &c.,

Corner, Weisbrod, Froeb & Charles, Attorneys for Plaintiff, Office and Post Office Address, 32 Court Street, Borough of Brooklyn, New York City.

To:

Edward M. Miller, E[illegible], Attorney for Defendants.

[fol. 255]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 7th day of March, 1960.

Present:

Hon. Gerald Nolan, Presiding Justice. Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. Marcus G. Christ, Hon. Nicholas M. Pette, Justices.

[Title omitted]

ORDER OF APPELLATE DIVISION DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS WITH NOTICE OF ENTRY—March 18, 1960

The above named Herbert W. Goldblatt and Builders Sand & Gravel Corp., the appellants in this action have made a motion for leave to appeal to the Court of Appeals and for other relief; and the motion having been duly submitted:

[fol. 256] Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

It is Ordered that the said motion be and the same hereby is denied.

Enter,

John J. Callahan, Clerk.

NOTICE OF ENTRY

Sir:

Please Take Notice that the within is a true copy of an Order this day duly made and entered herein in the office of the Clerk of Supreme Court, Second Department.

Dated, N. Y., March 18, 1960.

Yours, &c.,

Corner, Weisbrod, Froeb & Charles, Attorneys for Plaintiff, Office and Post Office Address, 32 Court Street, Borough of Brooklyn, New York City.

[fol. 257]

ORDER OF COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL—April 28, 1960

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of April, A. D. 1960.

Present:

Hon. Charles S. Desmond, Chief Judge, presiding.

[Title omitted]

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied upon the ground that an appeal lies as of right.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 258]

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of April, A. D. 1960.

Present:

Hon. Charles S. Desmond, Chief Judge, presiding.

[Title omitted]

ORDER OF COURT OF APPEALS GRANTING MOTION CERTIFYING CONSTITUTIONAL QUESTION—April 28, 1960

A motion having heretofore been made herein upon the part of the appellants for an order certifying that a constitutional question is involved upon the appeal herein and

papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 259]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

DECISION OF APPELLATE DIVISION

By Wenzel, Acting P. J., Beldock, Ughetta, Hallahan and Kleinfeld, JJ.

In an action to enjoin sand mining and related operations allegedly carried on in violation of a town ordinance, the appeal is from a judgment, entered after trial, adjudging inter alia, that the ordinance and the enforcement thereof are valid exercises of the police power of respondent, and that appellants be enjoined from conducting such operations. Judgment unanimously affirmed, with costs. No opinion.

[fol. 260] STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS—August 18, 1960 (omitted in printing).

[fol. 261] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 262]

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF HEMPSTEAD, Respondent,

v.

HERBERT W. GOLDBLATT et al., Appellants.

OPINION—Decided January 19, 1961

BURKE, J. The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions.

The defendants seek to revise a judgment of the Appellate Division unanimously affirming a judgment of Special Term upholding the constitutionality of the ordinance and enjoining the defendants from conducting sand mining and excavation on certain property in the Town of Hempstead until a permit has been issued and certain violations of the ordinance have been corrected. They contend that the ordinance cannot be sustained as a valid exercise of police powers and that it violates defendants' vested rights in an established nonconforming use.

Since the courts below have unanimously found that the defendants' proof failed to overcome the presumption of constitutionality and to establish the unreasonableness of the regulations, we may not hold that the ordinance which is an exercise of the town's statutorily delegated police power is invalid, unless there is no justification on "any state of the facts". (*United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 154.)

The sand and gravel pit in question lies in the midst of a densely populated residential area. Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children. The pit itself occupies a 38-acre tract of which approximately 20 acres

is beneath an artificial lake with an average depth of 25 feet. In order to provide protection against the danger of cave-ins, falls, drownings and water pollution, the ordinance makes provision for setbacks, degrees of slope, barricades, fences, lights, retaining walls and maximum ground water level. Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction of certain violations of the ordinance. There are approx-[fol. 263] imately 18 acres which are available for excavation. The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge, and their restraint need not await an event.

The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end. Upon this record a threat to the community's welfare may at least be said to be "reasonably apprehended". (*Wiggins* v. *Town of Somers*, 4 N Y 2d 215, 219.) "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining [case cited]. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community." (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410.) It is not the function of the courts but of legislators to determine the "reasonableness, wisdom and propriety" of the regulations needed to protect the community (*South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191), and their regulatory power, as the United States Supreme Court has pointed out, governs preexisting uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N Y 2d 370, cert. denied, 360 U. S. 902). Recognizing, there-

fore, that this court may not question the need for the legislation (*Olsen* v. *Nebraska*, 313 U. S. 236, 246) where there is found, as here, a rational basis for the legislative choice and no factual support for declaring it arbitrary (*Lincoln Bldg. Associates* v. *Barr*, 1 N Y 2d 413, 418-420), we do not believe that this ordinance can be declared as a matter of law to go beyond regulation to a degree which would impair its validity.

The judgment appealed from, therefore, should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). Defendants appeal as of right from a judgment upholding the constitutionality of Ordinance No. 16 of the Town of Hempstead, and enjoining the defendants from operating a sand and gravel pit until a permit has been issued by the Town of Hempstead, and certain violations of the said ordinance have been corrected. The defendant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead, which is the property involved in this litigation. The other defendant, Builders Sand and Gravel Corp., is the operator of the business of excavating and selling the sand and gravel taken from the land. The property was purchased by [fol. 264] Mr. Goldblatt's father in 1927 and the excavation and sale of sand and gravel has been carried on since 1927. Within a year after operations began, the excavation had gone below water level and an artificial lake was created, averaging now approximately 25 feet in depth.

The entire premises of defendant Goldblatt are surrounded by 7,000 lineal feet of a 6-foot chain-link fence, topped by 3 strands of barbed wire. The fence was built and the gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith.

When the 38 acres of land owned by defendant Goldblatt were purchased and dredging operations began in 1927, the surrounding property was mainly farm land. The first provision for residential zoning of property was enacted in January, 1930. Thereafter and during the time defendants continued their dredging operations, the surrounding area became heavily populated. Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants'

operations and the artificially created lake were evident and obvious.

In 1956 the plaintiff town brought to trial its first legal proceeding to terminate the defendants' dredging operations. That was a suit in Supreme Court, Nassau County, to restrain defendants from operating on the theory that defendants' dredging operations constituted a violation of the Zoning Ordinance of the Town of Hempstead.

It was held that defendants had a legal right, consisting of a prior nonconforming use, to continue their excavation and operations under water on their "entire premises * * * notwithstanding any Ordinances of the plaintiff". The opinion of Justice Hill states: "I find that the defendants are now and have been since 1927 conducting a prior nonconforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this nonconforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537." No appeal was taken from the judgment entered upon the opinion of Mr. Justice Hill.

In 1958 Ordinance No. 16 was amended to prohibit all excavation below water level and to require the filling in of excavations previously made. Defendants now conduct the only sand and gravel business by dredging in Hempstead and it would appear that the ordinance was aimed directly at them.

In the 1956 litigation before Mr. Justice Hill, the town did not bring into litigation or rely on the provisions of the original 1945 Ordinance No. 16 for the reason that defendants' operations complied with the regulatory provisions of the 1945 ordinance. It was not until the 1958 amendment of the ordinance that excavation below ground water level was prohibited.

[fol. 265] The plaintiff township would distinguish an invalid retroactive zoning ordinance attempting to eliminate a "nonconforming use" (*Matter of Harbison* v. *City of Buffalo*, 4 N Y 2d 553; *Town of Somers* v. *Camarco*, 308 N. Y. 537) from a "regulatory" ordinance which regulates the nonconforming use in the interest of public health and safety (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N Y 2d 370, cert. denied 360 U. S.

902). Both lower courts applied this distinction and held that the 1958 ordinance was a proper police power regulation designed to abate a dangerous situation.

While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to force the defendants out of business. The decision below has that practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act "innocent when done" (*People* v. *Oliver*, 1 N Y 2d 152, 158). In consequence it may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business.

A reading of the *Saxl* and *Engelsher* cases (*supra*) cited by the respondent town indicates that they were truly mere "regulatory" ordinances which did not operate to confiscate and prohibit absolutely. Since Ordinance No. 16 virtually eliminates the nonconforming use and prohibits unconditionally and finally all underwater dredging previously conducted on 20 acres of defendants' property, the theory of "regulation" cannot reasonably be sustained. The following observation of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* (260 U. S. 393, 415-416) is applicable: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

[fol. 266] Similar language was used by this court in *Arverne Bay Constr. Co.* v. *Thatcher* (278 N. Y. 222, 231).

In *People* v. *Calvar Corp.* (286 N. Y. 419) this court stated (p. 421): "Forceful argument may be made that a general and complete prohibition of such use of property, even where such use might be permitted without causing substantial injury to the community, would be unreasonable. That question must await determination until it arises. We express no opinion upon it. In this case there has been no such complete and absolute prohibition."

We think that this case falls within the ambit of the question left unanswered in the *Calvar* case.

Furthermore, in the *Harbison* case (4 N Y 2d 553, *supra*), it was held that the value of the investment in the property was relevant in determining the validity of an attempted elimination of a nonconforming use. In this case, defendants attempted to show the value of their investment but the trial court ruled against the introduction of such evidence. Such evidence was important and admissible under the majority ruling in the *Harbison* case and also under the doctrine in *People* v. *Miller* (304 N. Y. 105, 108, 109) where this court held that unless the "loss to the owner" of a prior nonconforming use is "slight and insubstantial" it could not be wiped out by an ordinance (see, also, *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540, *supra*). The record does indicate, however, the substantial nature of defendants' business.

In *Trio Distr. Corp.* v. *City of Albany* (2 N Y 2d 690, 696), we held that an ordinance was invalid "prohibiting the conduct of an occupation under the guise of regulation."

Upon the argument the attorney for plaintiff-respondent said in answer to questioning that he does not contend that this condition amounts to a nuisance, but that excavations of this kind are subject to regulation by ordinance under the police power. Of course they are, in the interest of public health and safety, but an examination of the clauses in the 1958 amendments to this Ordinance No. 16 supports the contention that it was directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object is not to promote public

health or safety, but to end the operation of this business under the guise of regulation.

The very circumstance that this gravel pit was conducted in conformity with the 1945 regulatory ordinance was exploited by the town to trap defendants by changing the permitted grade of the declining angle of the slope of the pit from 45 to 30 degrees, and by requiring a concrete curb beneath the 7,000 feet of fence which was built according to the 1945 requirement. No object in the installation of this concrete curbing has been shown except that it would put defendants to the expense of removing the fence, laying the concrete and constructing a new fence. This, [fol. 266a] along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation.

In 1959 the United States Bureau of Mines statistics show that the business of excavating and selling sand and gravel in the country totalled more than $700,000,000 and more than $27,600,000 in New York State alone. Much must have been spent on Long Island where, respondent itself asserts, building operations have proceeded at a high rate in the Town of Hempstead. There is nothing inherently dangerous or evil about this business, nor about excavating under water, which, especially in this area, has been a vital necessity. The minutes of the trial before Justice Hill, in evidence here, show that the gross annual business of defendants was in excess of $200,000 and that their capital investment was approximately $241,000. All of this is important as indicating that this is a lawful business which the "Declaration of Policy" in the ordinance says it was enacted to suppress. The regulatory provisions of the ordinance adopted in 1945, it is virtually conceded, were adequate to furnish protection against whatever hazards were created by the sand and gravel pits. That appears to have been drawn in substantially the same form as in the case of towns generally in the County of Nassau. Nor does the circumstance alter the case that there are 18 more acres in the tract which the photographs show to be entirely

occupied by the machinery used in the operation of the sand and gravel pit. Even if the land on which the machinery is located could be utilized for excavation, it would not help the ordinance which unlawfully prevents the operation of a lawful business on the 20 acres. It may be noted that, although the trial court excluded evidence of the value of the installations, the assessed valuation is in evidence as $66,000.

In endeavoring to close this pit the town says much about the safety of children. They are protected by the regulatory provision of the ordinance as it was enacted in 1945 according to a pattern prevalent throughout the country. The one drowning mentioned in the entire history of this pit, which is not shown by the record but does appear, we are told, from the police reports, happened in 1944 before the enactment of any ordinance requiring a fence to surround the excavation. The evidence indicates the existence of ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences. The presence of violations of the ordinance elsewhere would not, of course, prevent its enforcement, but it confirms that the object here was not regulation [fol. 267] but prohibition of the conduct of this business. There are some hazards in the operation of any legitimate business. Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.

The judgment appealed from should be reversed and the complaint dismissed, with costs in all courts.

Chief Judge Desmond and Judges Dye and Fuld concur with Judge Burke; Judge Van Voorhis dissents in an opinion in which Judges Froessel and Foster concur.

Judgment affirmed.

[fol. 268] Judge's and Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 269]

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of January, in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness:

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

No. 272

TOWN OF HEMPSTEAD, Respondent,

vs.

HERBERT W. GOLDBLATT & ano., Appellants.

REMITTITUR—January 19, 1961

Be It Remembered, That on the 20th day of August in the year of our Lord one thousand nine hundred and sixty, Herbert W. Goldblatt & ano., the appellants in this cause, came here unto the Court of Appeals, by Baar, Bennett & Fullen and Edward M. Miller, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Hempstead, the respondent—in said cause, afterwards appeared in said Court of Appeals by John A. Morhous, its attorney,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Milton I. Newman, of counsel for the [fol. 270] appellants, and by Mr. William C. Mattison, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, January 19, 1961.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 273]

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of Nassau at the courthouse located at 33 Willis Avenue, Mineola, New York, on the 15th day of February, 1961.

Present:

Hon. Edward Robinson Jr., Justice.

Index No. 4811/1959

Town of Hempstead, Plaintiff,

—against—

Herbert W. Goldblatt and Builders Sand & Gravel Corp., Defendants.

Order—February 15, 1961

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the

Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard the cause argued by Mr. Milton I. Newman, of Counsel for the appellants and by Mr. William C. Mattison, of Counsel for the respondent and having adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Nassau, and upon the annexed affidavit of Richard P. Charles, sworn to the 9th day of February, 1961.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead it is

[fol. 274] Ordered, that the order of the Court of Appeals herein dated the 19th day of January, 1961 be and the same hereby is made an order of this Court and the judgment entered herein on the 21st day of January, 1960, be and the same hereby is affirmed and that a judgment of this Court be entered herein affirming said judgment with costs of said appeal to be taxed in favor of the plaintiff and against the defendants.

Enter

Edward Robinson, Jr., J.S.C.

Entered Feb. 15, 1961	Granted Feb. 15, 1961
Francis J. Anderson, County Clerk of Nassau County	Francis J. Anderson Clerk

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 275]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

File No. 4811/1959

TOWN OF HEMPSTEAD, Plaintiffs,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants.

JUDGMENT ENTERED ON ORDER OF REMITTITUR—
February 21, 1961

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard said appeal and having ordered and adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the said Court of Appeals having been filed in the office of the Clerk of the County of Nassau and the order having been entered thereon on the 15th day of February, 1961 making the order of the Court of Appeals the order of this Court and directing the entry of a judgment of affirmance herein with the costs of said appeal to be taxed in favor of the plaintiff against the defendants.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead, Town Hall, Hempstead, N. Y. it is

Adjudged that the judgment of affirmance entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960 be affirmed; and it is further

[fol. 276] Adjudged that plaintiff, Town of Hempstead, Town Hall, Hempstead, N. Y., do recover of and have judgment against defendants, Herbert W. Goldblatt, 127 Stevens Ave., Hempstead, N. Y. and Builders Sand &

Gravel Corp., in the sum of $253.63, the costs and disbursements as taxed by the Clerk of this Court and that petitioners have execution therefor.

Dated, February 21, 1961.

Francis J. Anderson, Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 279]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

TOWN OF HEMPSTEAD, Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES—March 28, 1960

I. Notice is hereby given that Herbert W. Goldblatt and Builders Sand and Gravel Corp. hereby appeal to the Supreme Court of the United States from the final order and judgment of the Court of Appeals of the State of New York dated January 19, 1961 affirming the judgment of the Appellate Division of the Supreme Court for the Second Judicial Department, entered January 21, 1960, which affirmed the judgment of this Court entered August 4, 1959; and also appeal from the judgment dated February 21, 1961, entered and filed on that date in the Supreme Court of the State of New York, Nassau County, adjudging that the judgment of affirmance be affirmed, and the order of the said Court dated February 15, 1961 directing the entry of said judgment of affirmance.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in the said transcript the following:

[fol. 280] (1) The record on Appeal filed in the Court of Appeals.

(2) This Notice of Appeal and proof of service thereof.

(3) The Remittitur of the Court of Appeals of the State of New York filed in this Court.

(4) The majority and dissenting opinions of the Court of Appeals of the State of New York rendered in this cause.

III. The following questions are presented by this appeal:

(1) Is Ordinance No. 16 of the Town of Hempstead (County of Nassau, State of New York) enacted on December 18, 1945, as amended on November 25, 1958 unconstitutional in that it violates the due process clause and the equal protection of laws clause of the Fourteenth Amendment to the Constitution of the United States?

(2) Is Ordinance No. 16 of the Town of Hempstead (County of Nassau, State of New York) enacted on December 18, 1945, as amended on November 25, 1958 unconstitutional in that it violates the *ex post facto* provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States?

Dated: New York, N. Y., March 28, 1961.

Baar, Bennett & Fullen and Edward M. Miller, Attorneys for Defendants, Herbert W. Goldblatt and Builders Sand and Gravel Corp., Office and P. O. Address, 29 Broadway, New York 6, N. Y.

To:

John A. Morhous, Esq., Town Hall, Hempstead, New York, Attorney for Plaintiff.

[fol. 281] Clerk's Certificate to foregoing paper (omitted in printing).

Proof of service (omitted in printing).

[fol. 282]

SUPREME COURT OF THE UNITED STATES

No. 881—October Term, 1960

HERBERT W. GOLDBLATT, et al., Appellants,

vs.

TOWN OF HEMPSTEAD.

ORDER NOTING PROBABLE JURISDICTION—June 5, 1961

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.